

# INSIDE VOICES: PROTECTING THE STUDENT-CRITIC IN PUBLIC SCHOOLS

JOSIE FOEHRENBACH BROWN\*

*First Amendment doctrine acknowledges the constructive potential of citizens' criticism of public officials and governmental policies by offering such speech vigilant protection. However, when students speak out about perceived injustice or dysfunction in their public schools, teachers and administrators too often react by squelching and even punishing student-critics. To counteract school officials' reflexively repressive responses to student protest and petition activities, this Article explains why the faithful performance of public schools' responsibility to prepare students for constitutional citizenship demands the adoption of a more receptive and respectful attitude toward student dissent. After documenting how both educators and courts have mistakenly devalued important messages from young dissenters, this Article explores how to reformulate the doctrinal approaches used to resolve challenges to the suppression of student-critics and urges courts to recalibrate overly deferential assessments of educators' claims that student dissent compromises effective learning.*

## TABLE OF CONTENTS

Introduction.....	254
I. Cultivating Citizenship Capabilities: The Importance of Dissent and the Power of Petition .....	257
II. Student Speakers and the Contested Content of an Education for Citizenship .....	265
III. Dissent Devalued: The Vulnerability of the Student as a Citizen Critic.....	282
A. The Persistent Presence of the Child's Dissenting Voice.....	283
B. Dismissing the Student Critic: Errors and Alternatives ..	289

---

\* Assistant Professor, *University of South Carolina School of Law*; J.D. *Harvard Law School*. Thanks to Lisa Eichhorn and Thomas Brown for helpful comments on this article and to Micah Johnson, Rebecca Dulin, and Jessica Carlson for their capable research assistance. This article is dedicated to my daughter Veronica whose embrace of the future offers hope in the midst of heartache and to the memory of my son Lucian whose sweet voice I long to hear again.

1. Demanding unquestioning obedience: <i>Lowery v. Euverard</i> .....	289
2. Probing for retaliatory motive: <i>Pinard v. Clatskanie School District 6J</i> .....	294
3. Underestimating the young critic: <i>Walker-Serrano ex rel. Walker v. Leonard</i> .....	298
4. Experiencing citizenship in the classroom: <i>Downs v. Conway School District</i> .....	304
C. The Heightened Hazards of Overly Restrictive Reactions: The Implications of <i>Pearson</i> and <i>Garcetti</i> .....	306
IV. Making Room for Student Dissent at School.....	310
A. New Norms for Educators: Adopting a Capabilities Approach, Assuming a Fiduciary Role .....	310
B. Reframing Schools' Instructional Agenda to Protect the Student Critic: Civic Education's Participatory Imperative .....	315
C. Revising the Applicable Legal Standard.....	321
Conclusion .....	331

#### INTRODUCTION

The many youthful faces among the protesters of the Arab Spring and the Occupy Wall Street encampments exemplify the energizing role a nation's younger generation has played in advancing demands for social change and institutional reform. Youth's challenges to official repression and governments' infidelity to essential values serve as catalytic provocations. However, protests and petitions by America's public school students are too often ignored, squelched, and even punished by teachers and administrators. These reactions reflect a deeply flawed assessment of the constitutional interests at stake when students speak out about perceived problems at school.

Even in relatively recent American experience, repression has not been a governmental response reserved for youthful voices of petition and protest.<sup>1</sup> However, when children and youth seek protection of such expression, they face particularly formidable obstacles in schools and courts. The hostility to such expressive efforts by the young stems from a misguided unwillingness to see children as citizens and to see schools as invaluable sites of constitutional citizenship practice.

---

1. For critical examinations of increasingly restrictive governmental responses to attempts to use public spaces for political protest, see Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587 (2007); Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 *UCLA L. REV.* 1239 (2008); and Timothy Zick, *Speech and Spatial Tactics*, 84 *TEX. L. REV.* 581 (2006).

Protests at public schools have generated foundational First Amendment precedents.<sup>2</sup> By examining controversies arising from students' protests and petitions, this Article seeks to explore the constitutional parameters of children's citizenship and to discern the nature and limits of school officials' authority to restrict students' efforts to seek redress for grievances related to school practices. Such protest and petition activities offer vital citizenship experience for students, but they can also serve as valuable pedagogical opportunities for schools. In addressing the student critic, school officials can deliver a practical translation of often purely abstract constitutional values, giving substance to core First Amendment precepts, such as the checking function of dissent within a paradigm of responsive and accountable governance.

Regrettably, school officials' reactions to protest and petition activities may often be fueled by concerns about how criticism could compromise their preferred image of infallibility or dislodge a claimed mantle of competence. School officials may try to shield their decisions from student challenge, using whatever explanatory leeway can be found within relevant precedents to justify the suppression or punishment of the student critic. Officials often favor the defensive stratagem of conflating a student's allegation of misused official authority with the incitement of peers to flout the authority of teachers and administrators. Such a conflation conveniently short-circuits sincere engagement with the substance and origin of student dissent, potentially allowing school officials to insulate themselves from needed scrutiny. Even less self-serving school authorities facing the student critic may succumb to the temptation to react dismissively, discounting the speech's potential to spur school improvement and ignoring the educational opportunities such speech presents.

The doctrinal approaches used by federal courts to resolve challenges to the suppression or punishment of students who speak

---

2. See *Police Dep't v. Mosley*, 408 U.S. 92 (1972) (invalidating ordinance's content-based prohibition of all picketing outside public schools except labor-related picketing); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding students could not be punished for wearing anti-war armbands in absence of showing that such speech would materially disrupt school operations); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (ruling that required Bible reading and recitation of Lord's Prayer at start of each school day violated Establishment Clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that prescribed use of prayer, composed by government officials, to begin school day violated Establishment Clause); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that compelling public school students to salute the American flag or recite the Pledge of Allegiance violated the First Amendment).

out against perceived injustice or dysfunction at school too often reinforce school officials' distorted appraisal of what is at stake in such controversies. The content of the constitutional principles that should guide school officials and courts as they strive to strike an appropriate balance between free expression and institutional functioning merits renewed examination. Clarifying the constitutional dimensions of schools' instructional agenda could also help to counteract recent developments in the law of qualified immunity that may have effectively removed potential legal liability as a disincentive to deploying maximally restrictive responses against student dissenters. This topic has also taken on heightened urgency as *Garcetti v. Ceballos*<sup>3</sup> licensed greater restrictions of public employee speech and cast a shadow over teachers' ability to speak out about administrative or instructional problems in schools.

This Article's primary aim is to offer educators an explanation of why schools must adopt a more receptive and respectful attitude toward student dissent if they are to faithfully perform their obligation to prepare students for constitutional citizenship. This Article considers how federal courts could reinforce that understanding of schools' obligations by according less deference to school authorities' assertions that student dissent compromises effective learning. Indeed, courts should recognize that a repressive response to a student critic can compromise effective education for citizenship far more than the airing of student grievances ever could.

In cases like *West Virginia State Board of Education v. Barnette*,<sup>4</sup> *Brown v. Board of Education*,<sup>5</sup> and *School District of Abington Township v. Schempp*,<sup>6</sup> children have been agents of transformative American legal reforms that began in public schools but later reshaped the wider constitutional consciousness. By recognizing the value of the perspectives children can offer from within American classrooms and affording appropriately structured outlets for their nascent political activism, our schools can come closer to fulfilling their mission to awaken American children to the duties of constitutional citizenship. Children are frequently admonished to "use your inside voice" by supervising adults. In our public schools, that injunction to quiet down could be recast as an invitation to speak up as educators and courts recognize that preparing a child to exercise the citizen's

---

3. 547 U.S. 410 (2006) (holding that a public employee's statements made pursuant to his job duties did not warrant First Amendment protection).

4. 319 U.S. 624 (1943).

5. 347 U.S. 483 (1954) (rejecting the separate but equal doctrine as applied to public schools).

6. 374 U.S. 203 (1963).

prerogative to dissent may require extending vigilant constitutional protection to the student-critic.

# I. CULTIVATING CITIZENSHIP CAPABILITIES: THE IMPORTANCE OF DISSENT AND THE POWER OF PETITION

As a defining element of America's constitutionally enforced self-concept,<sup>7</sup> dissent takes many forms and potentially takes aim at a variety of targets, challenging established conventions and institutions. Dissent offers a wide range of benefits to American society and its citizens, and the protection of dissent should be understood as a structural imperative as well as an individual's right-based expectation. Cultivating the ability to critically engage with authority should therefore be a central component of citizenship education.

Dissent aimed at public officials offers practical assistance as it challenges authority, spurring institutional self-scrutiny and recommending needed reforms.<sup>8</sup> Unchallenged orthodoxy can stifle the individual spirit and sap societies' creative energy.<sup>9</sup> Extending vigorous First Amendment protection to dissenters affirms their potential contributions and signals receptiveness to necessary correction, an attribute of good and legitimate governance. A vigilant and critical citizenry exerts an essential corrective influence on the misdeeds and miscalculations of our public officials. Vincent Blasi describes the "checking value" of speech in exposing and counteracting the abuse of official power.<sup>10</sup>

Dissent that criticizes the government occupies the core of political speech, the most vigorously protected zone within the free speech

---

7. Austin Sarat, *Dissent and the American Story: An Introduction*, in *DISSENTING VOICES IN AMERICAN SOCIETY: THE ROLE OF JUDGES, LAWYERS, AND CITIZENS* 1, 1 (Austin Sarat ed., 2012).

8. John Stuart Mill warned against suppressing dissent and the consequent loss of "the opportunity of exchanging error for truth."<sup>9</sup> JOHN STUART MILL, *ON LIBERTY*, reprinted in *ON LIBERTY AND OTHER ESSAYS* 21 (John Gray ed., 2008).

9. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 82 (2003) (observing that a possible consequence of making some views "socially off-limits" will be that "what was once 'unthinkable' can become 'unthought,'" extinguishing possibility of change (quoting TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* 177 (1995))).

10. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 523. Blasi documents how the experiences and intellectual influences of the First Amendment's drafters produced a certainty that inclusion of such a protective provision was essential given the "fragility of constitutional government." *Id.* at 529-37. James Madison, in particular, stressed the citizens' role in exposing and seeking redress for official wrongdoing, effectively rejecting the notion that such a role would be the province of an institutional press. *Id.* at 536.

landscape.<sup>11</sup> When public officials seek judicial validation of the punishment of their critics, they attempt to resurrect a seditious libel regime and strike at the heart of the First Amendment. In his profoundly influential explorations of the theoretical underpinnings of First Amendment doctrine, Harry Kalven observed that, “despite its obvious centrality,”<sup>12</sup> the concept of seditious libel had been perplexingly neglected as a reference point in the articulation of free speech principles until *New York Times Co. v. Sullivan*.<sup>13</sup> In *Sullivan*, the Supreme Court acknowledged the concept’s utility in framing the analysis how free speech would be threatened if those criticizing public officials faced crushing defamation liability without proof of actual malice.<sup>14</sup> The Court stressed the constitutional imperative to protect the “citizen-critic,” writing “[i]t is as much [the citizen’s] duty to criticize as it is the official’s duty to administer.”<sup>15</sup> The “constitutional shield” bestowed on critics of official conduct embodied the “central meaning of the First Amendment.”<sup>16</sup>

Kalven identified the punishment of the offense of seditious libel as the “hallmark of all closed societies.”<sup>17</sup> Such regimes, Kalven explained, apprehend the dangerous power of criticism to undermine public confidence in, and allegiance to, current leaders and their policies.<sup>18</sup> The treatment of this kind of criticism represents “the true pragmatic test of freedom of speech.”<sup>19</sup> A government’s response to such speech reveals whether or not the speaker lives in a free society; “it is a profound tenet of democracy that no government

---

11. See *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion) (describing political speech as “at the core of what the First Amendment is designed to protect”); *FCC v. League of Women Voters*, 468 U.S. 364, 375–76 (1984) (characterizing political speech as “entitled to the most exacting degree of First Amendment protection”); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (explaining that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))).

12. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 19 (1965).

13. 376 U.S. 254 (1964).

14. *Id.* (holding that, to ensure adequate protection of speech and press freedom, a public official could not recover damages in defamation suit relating to performance of governmental duties unless the official could show allegedly defamatory statement was made or published with actual malice or with reckless disregard of statement’s truth or falsity).

15. *Id.* at 282.

16. *Id.* at 273. In his iconic dissent in *Abrams v. United States*, 250 U.S. 616 (1919), Justice Holmes concluded that, notwithstanding the enactment of the Sedition Act of 1798, the First Amendment could not have “left the common law as to seditious libel in force.” *Id.* at 630 (Holmes, J., dissenting).

17. KALVEN, JR., *supra* note 12, at 15.

18. *Id.*

19. *Id.* at 16.

official has the legal power to silence such commentary about himself.”<sup>20</sup>

The protection of dissent also serves other structural purposes. Respect for social critics ensures that minorities participate in self-governance,<sup>21</sup> incorporating potentially alienated outsiders into the body politic and diversifying the knowledge base for public decision-making. Such participation enhances the perceived legitimacy of government action,<sup>22</sup> contributing to the maintenance of social peace,<sup>23</sup> and improving the durability of citizens’ ties to their community.<sup>24</sup> By resisting the reflex to regard the citizen critic as an enemy and remaining open to the possibility that criticism may demonstrate loyalty and concern,<sup>25</sup> a social institution reveals its fundamental commitments.

Further, by protecting dissent that expresses what is perceived as a minority perspective, a society invites the presentation of an authentic self and the reconsideration of claimed identities and alliances. A society receptive to dissent promotes “engaged association” as the dissenter “seek[s] converts and colleagues.”<sup>26</sup> By protecting dissent a community demonstrates its respect for individual autonomy, allowing a person to explain her vision of “the life she endorses”<sup>27</sup> and to commend that vision of an ideal life to others as an invitation for them to join her in its collaborative construction.<sup>28</sup>

---

20. *Id.* at 15.

21. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1774 (2005).

22. *Id.* at 1775 (drawing on works of Stephen Carter, Steven Shiffrin, and Lee Bollinger).

23. See *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (arguing that repression of expression “menaces stable government”).

24. See STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDIATION ON LAW, RELIGION, AND LOYALTY* 97 (1998) (“[T]he justice of a state is not measured merely by its authority’s tolerance for dissent, but also by its dissenters’ tolerance for authority.”); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 18 (1999) [hereinafter SHIFFRIN, *DISSENT, INJUSTICE*] (describing dissent as “a form of cultural glue that binds citizens to the political community”); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 885 (1963) (noting “persons who have had full freedom to state their position and to persuade others to adopt it will . . . be more ready to accept the common judgment”).

25. Henry Louis Gates, Jr. has observed that “critique can also be a form of commitment, a means of laying a claim. It’s the ultimate gesture of citizenship. A way of saying: I’m not just passing through, I *live* here.” Henry Louis Gates, Jr., *On Patriotism*, NATION, July 15/22, 1991, at 91.

26. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 91 (1990) [hereinafter SHIFFRIN, *ROMANCE*].

27. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253 (2011).

28. *Id.* at 266–67.

As Cass Sunstein has noted in *Why Societies Need Dissent*, “even when minorities do not affect people’s publicly expressed views, they often have an impact on what people think privately,”<sup>29</sup> building the collective energy to dislodge outmoded, unfounded, or unjust habits of thought. Sunstein urges vigilance in the creation and maintenance of such an expressive environment, writing:

A well-functioning democracy has a culture of free speech, not simply legal protection of free speech. It encourages independence of mind. It imparts a willingness to challenge prevailing opinion through both words and deeds. Equally important, it encourages a certain set of attitudes in listeners, one that gives a respectful hearing to those who do not embrace the conventional wisdom. In a culture of free speech, the attitude of listeners is no less important than that of speakers.<sup>30</sup>

To describe the cultural ecology most conducive to the advancement of First Amendment objectives, the enforcement of governmental accountability, and the promotion of individual flourishing, the Supreme Court has repeatedly identified an imperative for the preservation of “breathing space” for even the most intemperate, offensive, or controversial speakers.<sup>31</sup> The First Amendment’s protection of dissent potentially conditions listeners and speakers to adopt useful attitudes, promoting tolerance and encouraging citizens to exercise self-restraint when tempted to stifle persons with jarring, unfamiliar, strident, or even hateful views.<sup>32</sup>

Dissent will not always challenge the commonly held convictions of the governed. Instead it may seek to end the enforcement of the preferences of the dominant, preferences that may be at odds with the common good or the good of an unjustly disempowered constituency that may in fact be a demographic majority. The dissenter may press for the end of an oppressive regime that falsely projects an image of unanimity of interest and ideology. Thus, the protection of dissent advances a project at the center of our

---

29. SUNSTEIN, *supra* note 9, at 31 (drawing on research presented in ROBERT S. BARON ET AL., *GROUP PROCESS, GROUP DECISION, GROUP ACTION* 79–80 (1992)).

30. *Id.* at 110 (emphasis omitted); see LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND THE EXTREMIST SPEECH IN AMERICA* 247 (1986) (describing free speech as “concerned with the development of a mind that is itself comfortable with uncertainty and complexity”).

31. See *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate . . . [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” (citation omitted) (internal quotation marks omitted)); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“First Amendment freedoms need breathing space to survive . . .”).

32. See BOLLINGER, *supra* note 30, at 9–10 (suggesting that society is strengthened when its members cultivate tolerance for differing viewpoints).



constitutional aspirations—the elimination of injustice. Steven Shiffrin argues that the dissenter can make an especially indispensable social and political contribution by “challenging unjust hierarchies” and advocating responsive change.<sup>33</sup> Therefore, Shiffrin asserts, “[f]ree speech theory should be taken beyond protecting or tolerating dissent: The First Amendment should be taken to reflect a constitutional commitment to *promoting* dissent.”<sup>34</sup>

Drawing on the rhetoric of the iconic Brandeis concurrence in *Whitney v. California*,<sup>35</sup> Vincent Blasi discerns a related aspiration within a First Amendment tradition that offers ample shelter to dissenters: the cultivation of the virtue of civic courage among our citizens.<sup>36</sup> Brandeis ascribed to the Framers a distinct vision of the civic life, stating that they “valued liberty both as an end and as a means.”<sup>37</sup> Brandeis went on to assert that the surest means to achieve enduring social stability was to protect the opportunity to discuss grievances and remedies.<sup>38</sup> Within this paradigm, “the greatest menace to freedom is an inert people,” and “public discussion is a political duty.”<sup>39</sup> To facilitate citizens’ truth-seeking and truth-telling, Brandeis argued, government had to nurture relevant human capabilities, arguing that “[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.”<sup>40</sup> Thus, Blasi concludes the

---

33. SHIFFRIN, DISSENT, INJUSTICE, *supra* note 24, at xii. As Shiffrin has perceptively detected, our constitutional culture reveals America’s complicated relationship with actual dissent and dissenters:

[T]he First Amendment serves to undermine dissent even as it protects it. Of course, the First Amendment protects dissent. It offers a legal claim for dissenters, and it functions as a cultural symbol encouraging dissenters to speak out. Nonetheless, the symbolism of the First Amendment perpetuates a cultural myth. It functions as a form of cultural ideology through which the society secures allegiance. It leads us to believe that America is the land of free speech, but it blinks at the “tyranny of the prevailing opinion and feeling,” and it masks the extent to which free speech is marginalized, discouraged, and repressed.

*Id.* at 26–27.

34. *Id.* at 91.

35. 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

36. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 696–97 (1988) [hereinafter Blasi, *First Amendment*]; *see also* *Whitney*, 274 U.S. at 374–80 (Brandeis, J., concurring).

37. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

38. *Id.* at 375–76 (“Believing in the power of reason as applied through public discussion, [the Framers] eschewed silence coerced by law—the argument of force in its worst form.”).

39. *Id.* at 375.

40. *Id.*

following: “Brandeis valued a strong doctrine of free speech largely for its contribution to the character of the political community, particularly the character of those who possess the power to regulate.”<sup>41</sup> If government hopes to nurture civic courage among its people, government officials should not respond to criticism of their performance or policies by displaying the fear that is frequently masked by repression.

Seana Shiffrin has recently proposed placing the “free thinker” at the center of free speech theory.<sup>42</sup> Shiffrin persuasively suggests that adopting a thinker-based perspective illuminates the normative foundation for the constitutional protection of speech and locates the project of discerning First Amendment free speech principles within a larger political theory framework.<sup>43</sup> Shiffrin connects the protection of freedom of speech to a democratic vision of citizens as “functional thinkers and moral agents” and argues that a government “cannot retain its legitimacy while undermining the conditions necessary for the development and exercise of each member’s capacities for free thought.”<sup>44</sup> To respect the individual’s “interest in the protection of the free development and operation of her mind,” free speech theory must, in Shiffrin’s view, address how laws, regulations, and other governmental practices interfere with or frustrate that interest.<sup>45</sup> To apprehend and counteract such injuries, free speech theory must also reinforce an appreciation of the spectrum of capabilities and opportunities the thinker’s interest encompasses. For Shiffrin, that spectrum includes “[a] capacity for practical and theoretical thought,” for “[a]pprehending the true,” and for “[e]xercising the imagination.”<sup>46</sup> To be a thinker a person must also cultivate the “intellectual prerequisites of moral relations” by acquiring knowledge of others and of the environments shared with them.<sup>47</sup> Free speech allows this developmental process to take place. Communication offers access to what others know and understand and facilitates the adoption of others’ perspectives in the midst of dispute or conflict. It also creates an opportunity for the individual to be known, understood, and respected, despite

---

41. Blasi, *First Amendment*, *supra* note 36, at 679–80.

42. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 283 (2011) [hereinafter Shiffrin, *Thinker-Based Approach*].

43. *Id.* at 284.

44. Seana Valentine Shiffrin, *Reply to Critics*, 27 CONST. COMMENT. 417, 417–18 (2011).

45. Shiffrin, *Thinker-Based Approach*, *supra* note 42, at 287.

46. *Id.* at 289.

47. *Id.* at 291.

difference.<sup>48</sup> Such experience and exchange, Shiffrin posits, are critical if citizens are to develop the “strong and independent capacities for thought and judgment” that are the prerequisites for successful and meaningful democratic governance.<sup>49</sup>

Shiffrin’s thinker-based approach to First Amendment analysis illuminates the link between the acquisition of critical thinking capabilities through expressive experience and the successful performance of the responsibilities of citizenship. Although Shiffrin’s work does not specifically consider public schools as a site of dissent, her insights can provide ammunition to discredit schools’ arguments that restrictive reactions to student dissent are necessary to achieve essential instructional objectives. Amy Gutmann has described the central objective of citizenship education as teaching children “not just to *behave* in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens.”<sup>50</sup> As an institution charged with cultivating students’ “civic disposition[,],”<sup>51</sup> schools must not be allowed to exempt themselves from being a target upon which students may train their critical thinking skills.

One particularly valuable mechanism for student practice of the skills of engaged citizenship is the exercise of the right to petition for redress of grievances. Regrettably, this pointed and valuable medium of dissent addressed to the government and its representatives has become increasingly marginalized in constitutional theory and precedent, a phenomenon that has drawn mounting criticism.<sup>52</sup>

---

48. *Id.* at 292.

49. *Id.* at 294–95.

50. AMY GUTMANN, *DEMOCRATIC EDUCATION* 51 (1987); *see also* Rebecca L. Brown, *Tradition and Insight*, 103 *YALE L.J.* 177, 180 (1993) (describing mature citizens as having developed “a certain degree of autonomy and capacity for independent judgment while still appreciating the value to be gained from wisdom and experiences of prior generations”); Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 *CAL. L. REV.* 1269, 1271 (1991) (calling for vigilant protection of student speech in light of role free expression can play in enhancing students’ “knowledge, intellect, and capacity for rational deliberation”); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 *U. CHI. L. REV.* 131, 188 (1995) (recommending that “a citizen needs to be able both to understand and internalize the norms of her society and to judge those norms against rational attack”).

51. *See* CAMPAIGN FOR THE CIVIC MISSION OF SCHS., NO EXCUSES: ELEVEN SCHOOLS AND DISTRICTS THAT MAKE PREPARING STUDENTS FOR CITIZENSHIP A PRIORITY, AND HOW OTHERS CAN DO IT, TOO 19 (2010), *available at* [http://www.americanbar.org/content/dam/aba/migrated/publiced/LabReport\\_Booklet\\_August\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/publiced/LabReport_Booklet_August_2010.authcheckdam.pdf) (encouraging schools to embrace mission of cultivating students’ civic learning and civic participation).

52. *E.g.*, RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES* (2012) (arguing for revitalized protection of varied

Calling for a re-examination of the constitutional status conferred on the petition right by the First Amendment, Ronald Krotoszynski has argued that the Petition Clause must at least afford citizens “meaningful access” to government officials.<sup>53</sup>

Protection for petitioning as a means of registering a citizen’s concern emerged from an Anglo-American tradition that embraced “a personal right to bring complaints about public policy directly to the officers of government, up to and including the king himself, and to receive some sort of response.”<sup>54</sup> During the early years of the American federal government, petitioning functioned as an effective complement to voting in making known the views of the citizenry,<sup>55</sup> and the drafting of the First Amendment signals the intent to embed a governmental duty to consider the grievances of the governed, including maladministration and corruption.<sup>56</sup> In both its historically distant and more recent forms, the petitioner’s encounter with those wielding governmental power could spur public debate, effect actual

---

forms of petitioning); *see also* *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2504 (2011) (Scalia, J., concurring in part, dissenting in part) (questioning the majority’s dismissive treatment of the claim that specific enumeration of the petition right in First Amendment text denoted entitlements distinct from the protection of other forms of speech). The *Duryea* majority’s reading tracks rulings such as *McDonald v. Smith*, 472 U.S. 479 (1985), which concludes that the Petition Clause has no independent meaning and conveys only the protection owed free speech generally. *Duryea*, 131 S. Ct. at 2495; *see also McDonald*, 472 U.S. at 485.

53. KROTOSZYNSKI, JR., *supra* note 52, at 17. *See generally* Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993) (examining the historical origins of the right to petition and its distinct role in regime of free expression). In response to the role public protests have played in pricking the public conscience and spurring needed reforms, Krotoszynski adds that enforcement of a properly articulated petition right would preserve access to both an official and a public audience so that the dissenting citizen can contribute to the process of public deliberation. KROTOSZYNSKI, JR., *supra* note 52, at 17, 51; *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 624 (1999) (noting that the right’s distinct character stems from the special values it serves, “giv[ing] citizens a sense of participation” while “help[ing] to keep the government better informed”).

54. KROTOSZYNSKI, JR., *supra* note 52, at 6. Even during the operation of the Sedition Act of 1798, petitioning of Congress was exempted from punishment. *Id.* In the early years of the American Republic, the right to petition was seen as self-evident and uncontroversial. *Id.* at 109–10.

55. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 25 (2004).

56. Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for Redress of Grievances*, 96 YALE L.J. 142, 142–43, 154 (1986). Ironically, the petition right’s potential to “expose public oppressions,” dramatized in the congressional petitioning campaigns of abolitionists in the nineteenth century, spawned resistance to its use—resistance formalized in so-called gag rules adopted to bar the introduction of anti-slavery petitions in the pre-Civil War Congress. *Id.* at 154, 158–65.

change, and reinforce the foundation of accountability essential to self-government.<sup>57</sup>

Even if one unwisely accepts the characterization of petitioning as “an imperfect form of democratic politics necessary only in times and places where universal suffrage does not exist,”<sup>58</sup> the importance of this instrument of communication for a constituency like children and youth who cannot yet vote can be readily appreciated. However, as will be considered in Part III below, the instrumental value and the constitutional significance of student petitioning and the airing of grievances about school in school, have been slighted by both educators and judges.

In First Amendment jurisprudence, courts have recognized dissent, conceived most fundamentally as the presentation of concerns and complaints about the functioning of government, as a core prerogative of citizenship. How public schools—institutions commissioned to help children understand and undertake their civic responsibilities—respond to dissent will shape student expectations about the content of their constitutional rights and roles as citizens. When responding to dissent, schools would ideally nourish and invigorate students’ expressive and analytical capabilities. Unfortunately, however, school officials have often overlooked the learning opportunities that student dissent creates, and courts have not consistently weighed those opportunities when balancing the interests in student speech cases.

## II. STUDENT SPEAKERS AND THE CONTESTED CONTENT OF AN EDUCATION FOR CITIZENSHIP

Within First Amendment scholarship, the analysis of how schools could actively promote free speech values by developing children’s capacities as speakers remains an oddly neglected topic.<sup>59</sup> Far more

---

57. See KROTOSZYNSKI, JR., *supra* note 52, at 13 (drawing on Alexander Meiklejohn’s argument that democratic self-government requires an engaged citizenry).

58. *Id.* at ix. Mass petitioning by suffragists prior to ratification of the Nineteenth Amendment illustrates the significance of this form of political action for the disenfranchised. *Id.* at 122. See generally SUSAN ZAESKE, SIGNATURES OF CITIZENSHIP: PETITIONING, ANTISLAVERY, & WOMEN’S POLITICAL IDENTITY (2003) (emphasizing the importance of women anti-slavery petitioners in the abolition movement).

59. See Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 860 (2000) (reviewing STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999)). Solum praises Shiffrin’s work for moving beyond conventional court-centered accounts to examine the role played by schools and media in advancing free speech values. *Id.* But see S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119 (1995) (critiquing schools’ hostility to student expression); Abby Marie Mollen,

common are examinations of how far free speech principles must, in the authors' view, be modified to scale back students' speech rights at school.<sup>60</sup> This trajectory within First Amendment scholarship tracks the path frequently taken by the Supreme Court in its interpretation of the constitutional rights of children.<sup>61</sup> Examining this pattern across several decisional domains, Emily Buss has adeptly chronicled the Supreme Court's problematic tendency to define children's constitutional rights by "whittl[ing] down" adult rights into a shrunken form, calculating the content of children's entitlements by "sloppily discount[ing]" formulas applied to adult claims.<sup>62</sup> This "adult-minus orientation," Buss persuasively argues, prevents the Court from responding to children's differences in the application of foundational constitutional principles.<sup>63</sup> As Buss has elaborated, faithful translation of how relevant principles should apply to children might require adapting the constitutional standard to impose greater or significantly different obligations on public officials.<sup>64</sup> Mindful of the imprint their response to student-critics will leave on the constitutional consciousness of their pupils, educators must calibrate their response to conform to a kind of precautionary principle, acknowledging that "[c]hildren are unlikely to internalize the value of the civic virtues of participation and tolerance if their schools appear to systematically trivialize and ignore such virtues."<sup>65</sup>

---

Comment, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501 (2008) (arguing that courts should insist on a showing of actual educational harm before validating school policies that restrict student speech).

60. See, e.g., ANNE PROFFITT DUPRE, *SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS* 10 (2009) [hereinafter DUPRE, *SPEAKING UP*] (arguing that *Tinker* adversely affected the student-educator relationship by undermining respect for authority); Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717 (2009) (rejecting the premise that students' speech rights are insufficiently protected at school and proposing that school-sponsored activities should be treated as a "nonforum" with regulation of student speech therein not subject to judicial review under the Free Speech Clause); R. George Wright, *Tinker and Student Free Speech Rights: A Functionalist Alternative*, 41 IND. L. REV. 105 (2008) (recommending that school officials be granted more leeway to restrict student speech in order to minimize distractions from instruction).

61. Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 355.

62. *Id.* at 355, 364.

63. *Id.* at 355.

64. *Id.* at 356.

65. See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 85 (1990) (advising that "[p]ublic schools, therefore, not only must intone the rhetoric of free speech, they must act and structure themselves to give credibility to their statements"); cf. Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1654 (1986) (observing that if constitutional constraints are not stringently applied to school officials, "students will

When asked to apply constitutional guarantees in the public school context, members of the Supreme Court have repeatedly offered lofty descriptions of the public school's role in cultivating a child's understanding of constitutional citizenship. In *Brown v. Board of Education*, the Court described public education as "the very foundation of good citizenship," and as "a principal instrument in awakening the child to cultural values."<sup>66</sup> In *Wisconsin v. Yoder*,<sup>67</sup> the Court endorsed the state's articulated objectives for its system of compulsory education: preparing citizens "to participate effectively and intelligently in our open political system" and "to be self-reliant and self-sufficient participants in society."<sup>68</sup> In *Ambach v. Norwick*,<sup>69</sup> the Court again stressed public schools' importance in preparing students for active citizenship<sup>70</sup> and in transmitting "the values on which our society rests."<sup>71</sup> The Court described the state's public school curriculum as constructed to "promote[] the development of the understanding that is prerequisite to intelligent participation in the democratic process."<sup>72</sup> The *Ambach* Court underscored teachers' influence on "the attitudes of students toward government, the political process, and a citizen's social responsibilities," exerting an influence deemed "crucial to the continued good health of a democracy."<sup>73</sup> In *Plyler v. Doe*,<sup>74</sup> the Court again embraced a vision of America's public school system as "'a most vital civic institution for the preservation of a democratic system of government.'"<sup>75</sup>

These consistent affirmations of public schools' civic importance camouflage fundamental disagreements about the content of an

---

not come to an understanding of the value of a democratic, participatory society, but instead will become a passive, alienated citizenry that believes that government is arbitrary").

66. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (noting the repeated affirmation of "an abiding respect for the vital role of education in a free society . . . in numerous opinions of Justices of this Court writing both before and after *Brown* was decided").

67. 406 U.S. 205 (1972).

68. *Id.* at 221.

69. 441 U.S. 68 (1979).

70. *Id.* at 76.

71. *Id.*

72. *Id.* at 78 n.8.

73. *Id.* at 79. The *Ambach* Court relied on then-recent social science literature as confirming the important function of schools in "inculcating fundamental values necessary to the maintenance of a democratic political system." *Id.* at 77 (citing RICHARD E. DAWSON ET AL., *POLITICAL SOCIALIZATION* 146–67 (2d ed. 1969); ROBERT HESS & JUDITH TORNEY, *THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN* 114, 158–71, 217–20 (1967); V. O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* 323–43 (1961)).

74. 457 U.S. 202 (1982).

75. *Id.* at 221 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

education for citizenship. Since the creation of an American public school system, two starkly different visions of the mission of public education have vied for dominance. In the social reproduction model, schools “inculcate students with society’s traditions and values,” equipping students to take part in democratic institutions, but aiming to preserve existing norms and practices.<sup>76</sup> In contrast, the social reconstruction model casts the school as “a lever of social change” oriented toward reform of the status quo.<sup>77</sup> Both models place education for citizenship on schools’ instructional agenda, but their prescriptions for how to deliver that education diverge sharply.

A battle over educational methodology is intertwined with the debate about whether schools should facilitate the replication or the revision of social traditions. As adroitly described by Stephen Goldstein, the more traditional prescriptive instructional model delivers “information and accepted truths” to a “passive, absorbent student.”<sup>78</sup> In contrast, under an analytic instructional regime, students and teachers scrutinize data and values “as active participants in the search for truth.”<sup>79</sup> Although versions of the prescriptive model may be regarded as the customary practice in American elementary and secondary schools, educational leaders, such as John Dewey, have long stressed that an effective education creates academic and civic proficiency by providing participatory experiences.<sup>80</sup>

However, many educators and legal scholars question whether public school students can acquire essential academic knowledge if order and obedience are not stringently enforced.<sup>81</sup> Establishing the requisite ordered atmosphere could require significant curtailment of student expression, but adherents of an obedience-oriented

---

76. Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 53 (1996).

77. *Id.* at 65 n.115 (quoting LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876–1957*, at 118 (1961)) (examining progressive educational philosophy of John Dewey).

78. Stephen Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970).

79. *Id.*

80. See generally LAUREL N. TANNER, *DEWEY’S LABORATORY SCHOOL: LESSONS FOR TODAY* (1997) (describing Dewey’s campaign for the delivery of an active, participatory educational experience in public schools).

81. See, e.g., DUPRE, *SPEAKING UP*, *supra* note 60, at 10, 258 (asserting that lack of order makes delivery of “serious education” impossible and linking disorder to misguided judicial intervention in schools precipitated by exaggerated student claims of rights); Bruce C. Hafen, *Schools as Intellectual and Moral Associations*, 1993 BYU L. REV. 605, 619 (stating that “only by submitting to the authoritative direction of teachers [can] young people learn the skills, attitudes, and understandings without which they cannot successfully sustain the operation of a democratic society”).



method argue such restrictions would result in little loss of real value.<sup>82</sup> Instead, the restrictions imposed in a strict school environment guide a child toward maturity and engrain the habits of self-control expected of a responsible citizen.<sup>83</sup>

In the First Amendment context, we can gain a vital perspective on the kind of citizenship education public schools offer by examining how freely students may speak at school and, in particular, how officials react when students criticize school policies and personnel. Evaluations of the scope of school officials' authority to regulate or restrict student speech inevitably focus on a familiar quartet of Supreme Court rulings: *Tinker v. Des Moines Independent Community School District*,<sup>84</sup> *Bethel School District No. 403 v. Fraser*,<sup>85</sup> *Hazelwood School District v. Kuhlmeier*,<sup>86</sup> and *Morse v. Frederick*.<sup>87</sup> However, an inquiry into the nature of schools' First Amendment duties toward the dissident student speaker properly begins with *West Virginia State Board of Education v. Barnette*.<sup>88</sup> In *Barnette*, a child was expelled from school for refusing to participate in the daily flag salute ritual mandated by state law.<sup>89</sup> That refusal, rooted in the religious beliefs of the child and her parents as Jehovah's Witnesses, can be readily understood as a protest against school officials' unconstitutional demand to recite a formulaic affirmation of loyalty to the United States.<sup>90</sup> Concluding that the state lacked constitutional authority to punish the objecting child for a "failure to conform" to such governmental demand,

---

82. See Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 666 (1987) ("[I]f free speech is to be meaningful, a citizen must have something worth saying, together with the maturity and the skill needed to say it.").

83. Justice Powell was a proponent of this view. See *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring) ("The primary duty of school officials and teachers . . . is the education and training of young people . . . . Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."); *Goss v. Lopez*, 419 U.S. 565, 593 (1975) (Powell, J., dissenting) ("Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life.").

84. 393 U.S. 503 (1969).

85. 478 U.S. 675 (1986).

86. 484 U.S. 260 (1988).

87. 551 U.S. 393 (2007).

88. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

89. *Id.* at 629. The child's refusal to participate in the flag salute was treated as insubordination, triggering the child's expulsion. *Id.* Deemed "unlawfully absent" as a result, the child faced delinquency proceedings and his parents could be prosecuted for causing such delinquency. *Id.*

90. See *id.* at 629–30 (explaining why Jehovah's Witnesses' beliefs prompted their refusal to salute the flag).

Justice Jackson emphatically rejected the state's assertion that the enforcement of such a constitutional limit would dangerously weaken the government's authority as an educator.<sup>91</sup> Justice Jackson wrote as follows: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."<sup>92</sup>

Justice Jackson went on to stress that daily school practices should not be shaped by a fear of intellectual or spiritual diversity.<sup>93</sup> School life should not project "an unflattering estimate of the appeal of our institutions to free minds," but should instead reflect that "[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."<sup>94</sup> Charged with both developing the talents of its students and communicating the demands of essential constitutional values, school officials had to acknowledge that they could not "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>95</sup>

In vindicating the child's challenge to the pledge requirement, the *Barnette* Court clarified that it was the school's response, not the child's request, that hampered the delivery of an education in the nature of constitutional citizenship.<sup>96</sup> The objecting child had actually created an opportunity to affirm a critical constitutional tenet: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."<sup>97</sup>

The Supreme Court again embraced the student dissenter in *Tinker*.<sup>98</sup> In December 1965, siblings Mary Beth and John Tinker, as well as Christopher Eckhardt wore black armbands to school in opposition to the Vietnam War.<sup>99</sup> The students were suspended based on a policy that had been hastily adopted only days before at a district

---

91. *Id.* at 629.

92. *Id.* at 637.

93. *Id.* at 641.

94. *Id.* at 641–42.

95. *Id.* at 642.

96. *Id.* at 637.

97. *Id.* at 642.

98. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

99. *Id.* at 504.

principals' meeting, convened to address reports of student plans to protest against the Vietnam War at school.<sup>100</sup> Under the policy, students wearing an armband at school would be suspended if they refused to remove it.<sup>101</sup> A memorandum prepared after the students' suspension alluded to concerns about how friends of a former high school student killed in Vietnam might react to the armbands and reports of other students' plans to wear armbands of different colors.<sup>102</sup> Trial testimony from school officials, however, indicated that the main impetus for the "no armband" rule was not apprehension about how the black armbands could disrupt school activities or spawn student altercations.<sup>103</sup> Instead, the officials acted because they believed "'the schools are no place for demonstrations,' and if the students 'didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools.'"<sup>104</sup>

The Supreme Court's exploration of how the First Amendment's free speech guarantees applied to student speakers in public school proceeded from two premises: (1) students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;" and (2) those rights would be "applied in light of the special characteristics of the school environment."<sup>105</sup> With their "witness of the armbands," the Tinker siblings and Christopher Eckhardt sought to make their views public and persuade others to adopt them.<sup>106</sup> Although the armbands prompted discussion both inside and outside their classrooms, they did not create any disorder.<sup>107</sup> Characterizing the wearing of armbands as symbolic expression, "closely akin to 'pure speech,'" Justice Fortas, writing for the majority, underscored that the students' expression had been "entirely divorced from actually or potentially disruptive conduct."<sup>108</sup> This emphasis signaled what would become the Court's central

---

100. *Id.* at 510.

101. *Id.* at 504.

102. *Id.* at 509 n.3.

103. *Id.*

104. *Id.*

105. *Id.* at 506.

106. *Id.* at 514.

107. *Id.*

108. *Id.* at 505. By highlighting that the evidence in the case showed "no aggressive, disruptive action," the majority opinion aligned *Tinker's* factual record with that of *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), which provided the template for the *Tinker* standard and distinguished it from events set forth in *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966). For an insightful examination of how these Fifth Circuit cases laid *Tinker's* foundation, see Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129 (2009).

concern as it balanced student speech rights with schools' recognized "comprehensive authority" to "prescribe and control" student conduct.<sup>109</sup>

Foreshadowing the standard he would articulate in *Tinker*, Justice Fortas offered a robust defense of the value of student dissent in his book, *Concerning Dissent and Civil Disobedience*, published the year *Tinker* was argued.<sup>110</sup> In the slim volume's second chapter, "The Simplicities: The Right to Dissent and Its Limitations," Fortas observed the following: "[U]nder our Constitution, the question is not 'may I dissent?' or 'may I oppose a law or a government?'"<sup>111</sup> Fortas took young protesters' demands to participate in political debate seriously and rejected portrayals of youth as either disengaged or petulantly rebellious, instead associating their activities with a "count me in" spirit.<sup>112</sup> Praising the constructive ambitions of "youth revolt," Fortas welcomed the opportunity such protest created "to reappraise the distribution of function and responsibility among the generations."<sup>113</sup> Fortas argued that America's older generation had a responsibility to guide young dissidents away from intemperate tactics that ignored the rights and needs of others and advised that "moderation, consideration, and sympathetic understanding" should be the hallmark of any response to youth protest.<sup>114</sup> Fortas took care to confine the possible basis for imposing restrictions on youths' expressive activities to a governmental duty to reconcile competing interests in a shared public space and to prevent harms that might be inflicted on other citizens in the absence of regulation.<sup>115</sup> This duty does not emanate from officials' defensive inclination to insulate themselves from criticism or challenge but only from government's obligations to protect citizens.

*Tinker* affirmed that school officials must have the authority to restrict speech that disrupts school operations or intrudes on other students' rights.<sup>116</sup> Such authority, however, did not extend to discipline based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>117</sup>

---

109. *Tinker*, 393 U.S. at 507.

110. ABE FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 17 (1968).

111. *Id.*

112. *Id.* at 71–72 (presenting "a youth reflection," which asked, "[s]ince inside of Me there is a Person, why should he not share in the shaping of my life and of the world in which I live").

113. *Id.* at 79.

114. *Id.*

115. *Id.* at 21.

116. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

117. *Id.* at 509.

Echoing *Barnette's* call for special vigilance in protecting constitutional rights in the institutions charged with “educating the young for citizenship,”<sup>118</sup> Justice Fortas invoked the specter of public schools becoming “enclaves of totalitarianism” in which students would become “closed-circuit recipients of only that which the State chooses to communicate . . . confined to the expression of those sentiments that are officially approved.”<sup>119</sup>

Tinker prescribed that school officials could prohibit student expression only when they had “reason to anticipate” that the speech “would substantially interfere with the work of the school or impinge upon the rights of other students.”<sup>120</sup> They could not suppress “expressions of feelings with which they do not wish to contend.”<sup>121</sup> Only by adhering to carefully calibrated limits on their authority to silence students could schools match the Constitution’s expectations for citizenship education:

Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . . [I]t is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.<sup>122</sup>

Justice Black, in his dissent in *Tinker*, saw more danger than opportunity in student dissent. Black reframed the issues in *Tinker* as whether students should be allowed to use schools as “platforms for the exercise of free speech” and questioned whether courts should wade into debates about daily school operations.<sup>123</sup> To Black, protecting the armband-wearers threatened to “subject[] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.”<sup>124</sup> Extending such protection would inhibit schools’ ability to impose discipline, which, Black insisted, is “an integral and important part of training our children to be good citizens.”<sup>125</sup> Fuming that public school students were not “sent to the schools at public expense to

---

118. *Id.* at 507.

119. *Id.* at 511.

120. *Id.* at 509.

121. *Id.* at 511 (citation omitted).

122. *Id.* at 508–09.

123. *Id.* at 517 (Black, J., dissenting).

124. *Id.* at 525–26.

125. *Id.* at 524.

broadcast political or any other views to educate and inform the public,” Black rejected the *Tinker* majority’s projected vision of a constitutional education<sup>126</sup> Instead, he emphasized that children should be in school to learn, not to teach.<sup>127</sup>

The imperatives underlying *Barnette* and *Tinker* became more muffled in *Bethel School District No. 403 v. Fraser*.<sup>128</sup> High school student Matthew Fraser had given a speech at a mandatory assembly as part of an educational program in self-government.<sup>129</sup> To nominate a friend for student body vice-president, Fraser offered a series of sophomoric sexual innuendos which the student audience greeted with reactions ranging from hoots and simulations of sex positions to bewilderment or discomfort.<sup>130</sup> Before the assembly Fraser had shown the text of his remarks to two teachers who warned him that presenting this kind of “inappropriate” content could lead to “severe” disciplinary consequences.<sup>131</sup> After Fraser’s speech, several teachers complained to the assistant principal and she concluded Fraser’s remarks had violated the school disciplinary code: “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”<sup>132</sup> After giving Fraser a chance to address the allegations, the assistant principal imposed two punishments: three days of suspension and the removal of Fraser’s name from the list of commencement speaker candidates.<sup>133</sup>

Over the dissents of only Justices Marshall<sup>134</sup> and Stevens,<sup>135</sup> the Supreme Court emphatically validated the school’s disciplinary response.<sup>136</sup> Stressing “the marked distinction” between the *Tinker* armbands’ “nondisruptive, passive expression of a political viewpoint” and the sexual content of Fraser’s remarks, Chief Justice

---

126. *Id.* at 522.

127. *See id.* (“The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders.”).

128. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

129. *Id.* at 678.

130. *Id.* at 687 (Brennan, J., concurring) (providing excerpts from Fraser’s speech).

131. *Id.* at 678 (majority opinion).

132. *Id.*

133. *Id.*

134. *See id.* at 690–91 (Marshall, J., dissenting) (arguing that the district failed to show educational disruption as required by *Tinker*).

135. *See id.* at 691 (Stevens, J., dissenting) (asserting that because the disciplinary code had not given Fraser fair notice that “offensive” speech would be sanctioned, he had been denied due process).

136. *See id.* at 686–87 (majority opinion) (reversing the Ninth Circuit Court of Appeals’ decision).

Burger's majority opinion disdainfully described the Ninth Circuit's contrary ruling as mistakenly equating "the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student" with the wearing of an armband "as a form of protest or the expression of a political position."<sup>137</sup>

Revealingly, Chief Justice Burger anchored his analysis in historians Charles and Mary Beard's description of how public schools should prepare students for citizenship: "It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."<sup>138</sup> In the *Fraser* Court's view, public schools must transmit a range of values "necessary to the maintenance of a democratic political system." These values include both "tolerance of divergent political and religious views" and an appreciation of the "sensibilities of others,"<sup>139</sup> and consequently "disfavor the use of terms of debate highly offensive or highly threatening to others."<sup>140</sup> Schools must balance the students' freedom to take unpopular positions in schools with the need to teach students the limits of socially appropriate behavior.<sup>141</sup>

Expected to "teach by example,"<sup>142</sup> school officials disciplined Fraser in order to communicate that "vulgar speech and lewd conduct is wholly inconsistent with the fundamental values of public school education."<sup>143</sup> Any other response would, Chief Justice Burger warned, signal that the specter presented in Justice Black's *Tinker* dissent had come to pass—teachers and administrators "surrender[ing] control" of American schools to the students.<sup>144</sup> Perhaps alarmed by Chief Justice Burger's sympathetic invocation of the authoritarian sentiments of Justice Black's *Tinker* dissent, Justice Brennan concurred but wrote separately to stress that the *Fraser* result should be seen simply as an application of *Tinker*'s disruption

---

137. *Id.* at 680.

138. *Id.* at 681 (citing CHARLES A. BEARD ET AL., *THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

139. *Id.*

140. *Id.* at 683. The Court noted that such standards of decorum are not unique to public schools, citing parliamentary rules of the U.S. House that proscribe the use of "indecent language" and Senate debate rules that forbid "offensive" references to any state or the imputation of "improper motives" to another Senator. *Id.* at 682.

141. *Id.* at 681.

142. *Id.* at 683.

143. *Id.* at 685–86.

144. *Id.* at 686 (citation omitted).

standard and not as an enlargement of the scope of the school's authority to limit student speech.<sup>145</sup>

The *Fraser* Court's vindication of school administrators' disciplinary action suggested an emergent shift in the Court's jurisprudence, away from the sympathetic embrace of student dissenters presented in Justice Fortas's *Tinker* majority opinion and toward the more restrictive vision of Justice Black's *Tinker* dissent. *Fraser* could, however, plausibly be read to uphold school officials' authority to impose discipline in order to modulate the manner in which students conducted their political exchanges while not endorsing the broader suppression of critical or controversial speech. Unfortunately, subsequent cases did not appear to subscribe to this interpretation of *Fraser*.

Two years later, the Supreme Court examined the nature of students' expressive freedom when it considered the scope of school administrators' authority to censor the speech of high school journalism students writing in the school newspaper in *Hazelwood School District v. Kuhlmeier*.<sup>146</sup> Prepared in a journalism class, the paper was produced with school district funds and equipment and was distributed within the school and to the surrounding community.<sup>147</sup> In late April 1983, the Journalism II teacher appears to have left precipitously to take a new job, and another teacher temporarily stepped in to oversee the preparation of the paper's last edition of that school year. When the principal reviewed the final edition proofs, he objected to two stories and ordered that they be excised.<sup>148</sup> One story examined the pregnancies of three girls who attended the school.<sup>149</sup> The other recounted how students had been affected when their parents divorced and included a named student complaining in some detail about what she perceived as her father's bad behavior as a spouse and parent.<sup>150</sup> The principal did not believe that the teen pregnancy story had taken sufficient care to shield the students' identities and also worried that the frank discussions of teen sex and birth control might be unsuitable for both younger students at the

---

145. *Id.* at 687–88 (Brennan, J., concurring).

146. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

147. *Id.* at 262. The students working on the paper received course credit and were supervised by a teacher. *Id.* at 268. Page proofs of each edition had to be submitted to the principal for review prior to publication. *Id.* at 269.

148. *Id.* at 263–64. The stories that concerned the principal appeared with other articles on two pages of the newspaper, and, to expedite production of the paper, the last edition before the end of the school year, the principal decided to delete the complete pages rather than only the two stories.

149. *See id.* at 263.

150. *See id.*



school and students' younger siblings who would have access to the paper when it was brought home.<sup>151</sup> The principal also feared the divorce story intruded too far into the families' private lives and was particularly concerned about the student authors' failure to consult the spotlighted parents to verify the accuracy of their children's accounts or to ascertain if they had concerns about the story's impact.<sup>152</sup>

Several members of the newspaper staff challenged the principal's mandate to remove the articles, asserting that their First Amendment rights had been violated.<sup>153</sup> The students lost in federal district court but prevailed in the Eighth Circuit. The appellate court accepted the students' claim that the paper served as a public forum and ruled that school officials could control the content of speech presented in such a forum only when, as in *Tinker*, such action was "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others."<sup>154</sup>

The Supreme Court quickly rejected the "public forum" designation for the paper, finding that neither the school's past practices nor the terms of relevant policies reflected an intent to relinquish control over the paper as a supervised, curricular learning experience. Instead, school officials had retained authority to regulate the paper.<sup>155</sup> The Court stressed the significance of the difference between the speech in the excised articles and "a student's personal expression that happens to occur on school premises," which had been wrongly suppressed in *Tinker*.<sup>156</sup> Accepting educators' concern that the public might perceive that material published in a school paper bore "the imprimatur of the school,"<sup>157</sup> the *Hazelwood* Court linked to the need to ensure that supervised activities served curricular objectives, "impart[ing] particular knowledge or skills to student participants and audiences."<sup>158</sup> School officials could regulate speech in these school-sponsored venues "to assure that participants learn whatever lessons the activity is designed

---

151. *Id.* at 263–64.

152. *Id.*

153. *Id.* at 264.

154. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1374 (8th Cir. 1986) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969)), *rev'd*, 484 U.S. 260 (1988).

155. *Hazelwood*, 484 U.S. at 270. The Court found students' assertions that they believed that they could publish "practically anything" unsupported by school officials' past course of conduct or the text of cited policies. *Id.* at 269.

156. *Id.* at 271.

157. *Id.*

158. *Id.* at 271.

to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”<sup>159</sup>

The school needed the ability to disassociate itself from speech that would be “disseminated under its auspices” but that would not meet the standards the school enforced to achieve its instructional objectives.<sup>160</sup> In addition, consistent with their overarching custodial and instructional responsibilities, school officials “must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics,”<sup>161</sup> and can “refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order,’ . . . or to associate the school with any position other than neutrality on matters of political controversy.”<sup>162</sup> The *Hazelwood* majority therefore concluded that *Tinker*’s standard did not apply when a school exercised control over student expression in school-sponsored expressive activities.<sup>163</sup> In such circumstances, school officials acted constitutionally as long as their decisions were “reasonably related to legitimate pedagogical concerns.”<sup>164</sup>

In dissent, Justice Brennan, joined by Justices Blackmun and Marshall, sharply attacked what he saw as the majority’s abandonment of *Tinker*’s vigilant concern for students’ expressive rights.<sup>165</sup> To Brennan, the majority’s new approach to what was deemed “school-sponsored” student expression handed school

---

159. *Id.* at 271–72. This kind of problematic speech included written work that was “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.” *Id.*

160. *See id.* (explaining that the school needed the ability to disassociate itself from speech that would be “disseminated under its auspices” but that would not meet the standards the school enforced to achieve its instructional objectives).

161. *Id.* at 272.

162. *Id.* (internal citation omitted). The *Hazelwood* majority’s allusion to the need for a school to maintain a position of “neutrality on matters of political controversy” has not received much specific attention, but this formulation could be invoked by school officials to justify some disturbing conclusions. *See* Anoka-Hennepin Sch. Dist., *Agreement Reached on Harassment Lawsuit*, ANOKA-HENNEPIN NEWSROOM (Mar. 8, 2012), <http://www.anoka.k12.mn.us/education/components/whatsnew/default.php?section-detailid=233754&itemID=48062> (describing signing of consent decree in which Minnesota school district agreed to abandon “neutrality” policy that had been interpreted to bar teachers from intervening when LGBT students were subjected to harassment).

163. *Hazelwood*, 484 U.S. at 272–73.

164. *Id.* at 273.

165. *Id.* at 282–83 (Brennan, J., dissenting).

administrators a menu of broadly worded excuses for censorship,<sup>166</sup> effectively allowing them to “camouflage viewpoint discrimination as the ‘mere’ protection of students from sensitive topics.”<sup>167</sup> To Justice Brennan, the majority’s approach threatened to undermine both students’ expressive freedom and the schools’ credibility when seeking to convince young people that “our Constitution is a living reality, not parchment preserved under glass.”<sup>168</sup>

In its most recent student speech ruling, *Morse v. Frederick*, the Supreme Court upheld a principal’s decision to suspend a senior who had unfurled a 14-foot “BONG HiTS 4 JESUS” banner as he stood watching the Olympic Torch Relay go past his high school.<sup>169</sup> The eighteen-year-old student, Joseph Frederick, had brought the banner from home, ostensibly hoping to catch the attention of TV cameras covering the Olympic event.<sup>170</sup> When Principal Deborah Morse saw Frederick and his classmates holding the banner up across the street from the school, she demanded that the students immediately put it down.<sup>171</sup> As Morse would later explain to the student, she believed the banner promoted drug use, an interpretation the majority of the Court accepted as plausible despite the banner’s “cryptic” phrasing.<sup>172</sup> The principal anticipated that other students, school district personnel, parents, and members of the public would interpret the banner as she did and see a failure to demand its removal as a contradiction of the school’s unequivocal stand against drug abuse.<sup>173</sup>

Reviewing the student speech precedents, Chief Justice Roberts stressed the “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of [Fraser’s] speech.”<sup>174</sup> Chief Justice Roberts drew specific attention to the observations in Justice Brennan’s *Fraser* concurrence that school officials there had sought only to maintain order in a high school

---

166. *Id.* at 282.

167. *Id.* at 288.

168. *Id.* at 290 (citing *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 972 (5th Cir. 1972)).

169. *Morse v. Frederick*, 551 U.S. 393, 397–98 (2007).

170. *Id.* at 396–97, 401. The school’s staff and students had been given permission to leave the school to watch as the Torch Relay passed by. The Court accepted that students were subject to school policies addressing behavior while on an approved social event or class trip even if, like Frederick, they were not standing on school property and had not yet entered the school building that day. *Id.* at 397, 401.

171. *Id.* at 398.

172. *Id.* at 401.

173. *Id.*

174. *Id.* at 404 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1996)).

assembly and that there had been no indication that school officials reacted to Fraser's speech because they disagreed with his views.<sup>175</sup> Finding the analytic formula used in *Fraser* "unclear," Chief Justice Roberts extracted two key principles from that opinion: "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"<sup>176</sup> and "the mode of analysis set forth in *Tinker* is not absolute" given that the *Fraser* Court had not required a demonstration of substantial disruption.<sup>177</sup>

The Chief Justice then framed his consideration of whether Frederick's punishment could be reconciled with the First Amendment by noting that the Court's school search and drug testing precedents had established that deterring student drug use was clearly an important, and perhaps even a compelling, interest in light of the special physical harms associated with drug abuse during critical periods of child development.<sup>178</sup> In his synthesis of student speech precedents, the Chief Justice endorsed giving school officials some latitude to regulate or even punish student speech in the absence of substantial disruption.<sup>179</sup> However, he explicitly reaffirmed *Tinker's* warning that schools may not prohibit student speech based only on "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" and underscored that Principal Morse's reaction was not grounded in "an abstract desire to avoid controversy."<sup>180</sup> Moreover, he forcefully rebuffed the claim that prior precedent allowed school officials to restrict any student speech they deemed "plainly offensive."<sup>181</sup>

---

175. *Id.*

176. *Id.* at 404–05 (citing *Fraser*, 478 U.S. at 682).

177. *Id.* at 405.

178. *Id.* at 407. *Morse* specifically highlighted that Congress had, pursuant to a federal funding condition, mandated that schools provide an anti-drug curriculum and present "a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful." *Id.* at 408 (citing 20 U.S.C. § 7114(d)(6) (2000 & Supp. IV 2006)).

179. *Id.* at 404.

180. *Id.* at 408–09 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969)).

181. *Id.* at 409. The National School Boards Association had argued, "[s]ince school officials handle day-to-day operations of their schools, and school board members are typically members of the local community, they are best situated to apply evolving community standards in their schools and to determine whether a student's speech is counter to or 'plainly offensive' to their educational mission." Brief of Amici Curiae National School Boards et al. in Support of Petitioners at 17, *Morse v. Frederick*, 551 U.S. 393 (2007) (No. 06-278).

In a concurring opinion joined by Justice Kennedy, Justice Alito stressed the danger ahead if there was any hint that student speech could be suppressed based on the vague assertion that such speech interfered with the school's "educational mission."<sup>182</sup> This kind of justification, Justice Alito wrote, would allow public school officials to regulate speech simply because they disagree with the viewpoint—a rationale that "strikes at the very heart of the First Amendment."<sup>183</sup> To cabin *Morse's* implications, Justice Alito offered this careful description of its holding:

I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medicinal use. I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.<sup>184</sup>

Thus, although *Morse's* endorsement of a very specific form of viewpoint discrimination has drawn criticism,<sup>185</sup> both the opinion for the court and the concurrence of Justices Alito and Kennedy recognize important limitations on schools' authority to curtail student speech and express concern about the potential abuse of school authority to silence student speech that is political or controversial, telegraphing at least some hope for the protection of future student dissenters.<sup>186</sup>

---

182. *Morse*, 551 U.S. at 423 (Alito, J., concurring).

183. *Id.*

184. *Id.* at 422.

185. See *id.* at 437 (Stevens, J., dissenting) (criticizing the *Morse* analysis as "invit[ing] stark viewpoint discrimination" by school officials); see also Hans Bader, *BONG HiTS 4 JESUS: The First Amendment Takes a Hit*, 2007 SUP. CT. REV. 133, 142 (describing *Morse* as departing from understanding that "[w]hatever other limits the Supreme Court has placed on students' free speech rights in the past, it had never countenanced viewpoint discrimination of student speech prior to *Morse*"); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 300 (2007) (decrying *Morse* as "overreaching and too unprincipled to allow for consistent application in practice" and predicting it "will make it easy for other schools and other courts to discover new subject areas in which student speech can be prohibited").

186. See Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 484–86 (2008) (describing amici filings of religious legal advocacy groups asserting apprehensions about implications for student religious speech at school if the Court accepted the argument that schools could restrict speech that officials saw as "counter to the school's educational mission").

The *Tinker* Court rejected the idea that student dissent was incompatible with the instructional mission of the public schools,<sup>187</sup> emphasizing that “the process of education in a democracy must be democratic.”<sup>188</sup> As the Court qualified its endorsement of students’ expressive liberty, authorizing limitations on student speech in *Fraser*, *Hazelwood*, and *Morse*, school officials were able to seize on the often imprecise descriptions of the scope of their authority to justify silencing or punishing student speakers, especially those who took issue with school policies or the conduct of teachers or administrators. School officials, like reviewing courts, failed to consistently resist what Jamin Raskin has aptly described as the “undertow of institutional authoritarianism.”<sup>189</sup> As Justice Thomas observed in his *Morse* concurrence, the Supreme Court’s “jurisprudence now says that students have a right to speak in schools except when they do not,”<sup>190</sup> putting student-critics and effective education for citizenship at risk.

### III. DISSENT DEVALUED: THE VULNERABILITY OF THE STUDENT AS A CITIZEN CRITIC

Can public school students serve as citizen-critics? As a matter of First Amendment doctrine, should they be afforded vigilant protection when they speak out against what they identify as official misconduct, deficient performance of duty, obstruction of needed change, or the unjust use of authority? This Article argues that children can and have assumed the role of responsible citizen-critics in American schools as well as in other social contexts.<sup>191</sup> However, school officials, both teachers and administrators, often devalue or dismiss the messages of the youngest dissenters. Even when this mistaken reaction prompts judicial correction, the articulated rationale for the protection of student speech frequently underplays the value of critical student speech and rarely considers how the

---

187. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–11 (1969); see also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1779–80 (1987) (construing *Tinker* as offering a variation on the analysis used in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972), which focused on “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”).

188. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 159 (1969).

189. Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U. L. REV. 1193, 1201, 1205–06 (2009).

190. *Morse*, 551 U.S. at 418 (Thomas, J., concurring). Unfortunately, Justice Thomas’s preferred corrective to the vagaries of the Supreme Court’s analysis of children’s rights under the Free Speech Clause would be to “dispense with *Tinker* altogether.” *Id.* at 422.

191. See *infra* notes 200–33 and accompanying text.

suppression of student criticism could be at odds with schools' responsibility to inculcate the habits of citizenship. Moreover, recent rulings on qualified immunity may have significantly diminished fear about legal liability as a force inhibiting school officials' tendency to react repressively.<sup>192</sup>

If, as Steven Shiffrin has argued, the First Amendment should be understood to "reflect a commitment to *promoting* dissent"<sup>193</sup> in order to realize an overarching constitutionally grounded ambition to cultivate citizens' capacities to identify and redress injustice, such a commitment would inform the nation's educational enterprise.<sup>194</sup> However, as Shiffrin has lamented, such an ethos is often not only absent from American classrooms but actively discouraged there.<sup>195</sup> As will be documented in this section, today's student critic should expect hostility from school personnel and inconsistent protection from federal courts.

#### A. *The Persistent Presence of the Child's Dissenting Voice*

American children have occupied an important place in both the rhetoric and reality of our constitutional culture. The special power of a child's voice in presenting an indictment of unjust authority reverberates across centuries of American political dissent, emanating from our founding generation. The rhetoric of the Revolutionary Era repeatedly portrayed the American colonist as "the rightfully rebellious child of autocratic parents."<sup>196</sup> Thomas Paine, in particular, favored the use of images of suffering children to "summon both the feeling of a situation demanding immediate response and the confidence that present inequities and difficulties will be overcome" as the empowered colonial child rises up heroically

---

192. See *infra* notes 364–81 and accompanying text.

193. SHIFFRIN, DISSENT, INJUSTICE, *supra* note 24, at 91.

194. *Id.* at 112.

195. See *id.* at 113 (noting how elements of public school curricula such as daily ritual recitation of the Pledge of Allegiance and content of social studies texts powerfully reinforce models of citizenship rooted in conformity and submission to governmental authority); see also Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 43 GA. L. REV. 447, 449, 453–54 (2009) (arguing that the primary ambition and predominant effect of patriotic education curriculum, including daily pledge recitation, is the creation of emotional attachment to the nation in a manner that suppresses critical appraisal of government).

196. GILLIAN BROWN, *THE CONSENT OF THE GOVERNED: THE LOCKEAN LEGACY IN EARLY AMERICAN CULTURE* 16 (2001) (connecting the recurrent use of images of aggrieved children to the installation of citizen consent at the center of American constitutional vision).

against its cruel and imperial parent.<sup>197</sup> In the nineteenth century as the country grappled with the coming of the Civil War, Walt Whitman would continue to use depictions of a child as a persuasive vehicle in political and social debate, evoking the child as “bearer of authenticity and ‘true consciousness’” to reflect back the problematic nature of the society that would shape and potentially deform the developing child.<sup>198</sup>

Children, like other dissenters, have raised their voices to express “the fears, hopes, and aspirations of the less powerful to those in power.”<sup>199</sup> Child workers advanced the struggle for labor rights.<sup>200</sup> Small girls faced down police and stood their ground as they went on strike for fair wages at box and match factories.<sup>201</sup> Messenger boys protested against excessive work schedules, pay delays, and worker fines.<sup>202</sup> Young girls from New York City’s garment factories marched for safer working conditions and an end to exploitation, and newsboys staged strikes when paper owners tried to price them out of their jobs and replace them with scab sellers.<sup>203</sup>

As active participants in the civil rights protests of the 1950s and 1960s, black children and youth met shocking official brutality with courage and dignity, inspiring black and white Americans to press forward for the enactment of civil rights statutes.<sup>204</sup> Before Rosa

---

197. *See id.* at 100–06 (analyzing Paine’s use of images of a wronged but ultimately triumphant child to project the image of colonists’ course from “subjection to self-government”).

198. CAROLINE F. LEVANDER, CRADLE OF LIBERTY: RACE, THE CHILD, AND NATIONAL BELONGING FROM THOMAS JEFFERSON TO W.E.B. DU BOIS 9–12 (2006).

199. SHIFFRIN, ROMANCE, *supra* note 26, at 96.

200. Caroline G. Trinkley, *Child Labor in America: An Historical Analysis*, 13 IN PUB. INTEREST 59, 84 (1993).

201. *Id.* at 84–86.

202. *Id.* at 87.

203. *Id.* at 86, 89; *see also* Barbara Bennett Woodhouse, *The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1569, 1571–72 (citing the history of children’s role in labor protests as chronicled in SUSAN CAMPBELL BARTOLETTI, KIDS ON STRIKE! 8–12, 27 (1999)).

204. *See* CYNTHIA LEVINSON, WE’VE GOT A JOB: THE 1963 BIRMINGHAM CHILDREN’S MARCH (2012) (presenting interviews with children, some as young as nine, who were willing to risk arrest by joining thousands of other students in civil rights protest marches in May 1963). *See generally* ELIZABETH PARTRIDGE, MARCHING FOR FREEDOM: WALK TOGETHER, CHILDREN, AND DON’T YOU GROW WEARY (2009) (recounting experiences of elementary and high school students participating in the 1965 Alabama marches for voting rights); Sam Dillon, *Wisdom of Leaders and Guidance for Graduates*, N.Y. TIMES, June 21, 2010, at A22 (presenting an excerpt from an address by University of Maryland, Baltimore County President Freeman Hrabowski III in which he describes the lesson to be drawn from his decision, at age thirteen, to face arrest and jail for joining the 1963 Birmingham civil rights demonstrations: “Even children can think critically and make decisions that can affect their lives”). For a comprehensive examination of the rhetorical framing of the crusade for racial equality as a fight for black children’s futures and the special role of youth in the black freedom struggle from 1940s through the 1960s, *see* REBECCA DE SCHWEINITZ, IF



Parks, fifteen-year-old Claudette Colvin resisted segregation on Montgomery, Alabama city buses.<sup>205</sup> Colvin refused a bus driver's demand to give up her seat to a white woman when all the seats in the white section were filled and was arrested.<sup>206</sup> In April, 1951, Barbara Johns, a high school junior from Prince Edward County, Virginia set in motion the events that would culminate in the Supreme Court's landmark ruling in *Brown v. Board of Education*.<sup>207</sup> Outraged by the stark inequality in conditions in local black and white schools, Johns led her fellow students in a walkout from R.R. Moton High School<sup>208</sup> and then wrote to NAACP lawyers, urging them to represent local families in a suit challenging school segregation.<sup>209</sup>

Children were also at the forefront of the campaign to vindicate the freedom of conscience in American classrooms, securing the end of compelled recitation of the Pledge of Allegiance<sup>210</sup> and of mandatory Bible reading and daily prayer rituals.<sup>211</sup> The Supreme Court's docket has consistently included claims pressed by children, often effectively, against school practices that threaten students' First and Fourth Amendment rights.<sup>212</sup>

---

WE COULD CHANGE THE WORLD: YOUNG PEOPLE AND AMERICA'S LONG STRUGGLE FOR RACIAL EQUALITY (2009); see also DAVID HALBERSTAM, *THE CHILDREN* (1998), which recounts the role black children and youth played in sit-ins, protest marches, and civil disobedience actions across the South during the civil rights era.

205. See generally PHILLIP M. HOOSE, *CLAUDETTE COLVIN: TWICE TOWARD JUSTICE* 27–35 (2009) (recounting Claudette's story of her encounter with the police on the bus).

206. *Id.* at 29–35. Colvin's boldness spurred the city's black leaders, including newly arrived pastor Martin Luther King, Jr., to resolve to confront the daily indignities blacks faced on the city bus system. *Id.* at 38–41. Colvin went on to become a plaintiff in the successful constitutional challenge to the Alabama statute and Montgomery city ordinance mandating bus segregation. *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (mem.).

207. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 469–70 (1975).

208. *Id.*; see also BOB SMITH, *THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964*, at 38–39 (1965) (describing the nature of the disparity in school conditions and Barbara Johns' rallying of her fellow students).

209. KLUGER, *supra* note 207, at 471; see Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419, 420–21 & n.6 (2006) (quoting a portion of the letter written to NAACP in which Johns and Carrie Stokes begged for immediate legal assistance so students could graduate on time). The lawsuit, *Davis v. Cnty. Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952), became one of the four cases resolved in *Brown v. Board of Education*, 347 U.S. 483 (1954).

210. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

211. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). For a detailed narrative of Ellery Schempp's decision to challenge his Pennsylvania school district, see generally STEPHEN D. SOLOMON, *ELLERY'S PROTEST: HOW ONE YOUNG MAN DEFIED TRADITION AND SPARKED THE BATTLE OVER SCHOOL PRAYER* (2007).

212. See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (holding school officials' search of teenage student's bra and underwear

Student dissent also illuminated the difficulties that arose as school systems implemented desegregation orders, revealing vestiges of the discredited old order and the realities of lingering resistance to needed change.<sup>213</sup> Such protests did not always find a receptive judicial audience even in the immediate wake of *Tinker*.<sup>214</sup>

Students have continued to use a variety of vehicles to deliver what are, in effect, petitions for redress of grievances. Such vehicles include editorials in school papers,<sup>215</sup> underground publications,<sup>216</sup> and artistic performances.<sup>217</sup> Students have expressed their concerns about school labor practices<sup>218</sup> and the treatment of faculty,<sup>219</sup> and students continue to object to over-reaching policies regarding the

---

unconstitutional); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating policy allowing students to deliver opening prayers at high school football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating practice of inviting clergy to deliver opening and closing messages at public school graduation ceremonies); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 231 (1990) (rejecting school's assertion that complying with Equal Access Act by giving student religious club access to school facilities would violate Establishment Clause).

213. See *Black Voters v. McDonough*, 421 F. Supp. 165, 176–77, 183 (D. Mass. 1976) (noting the history of black student boycotts and white parent and student protests as the school district grappled with implementation of busing plan), *aff'd*, 565 F.2d 1 (1st Cir. 1977); *United States v. Corinth Mun. Separate Sch. Dist.*, 414 F. Supp. 1336, 1339 (N.D. Miss. 1976) (characterizing the presence or absence of student protest against white administrators as an indicator of how successfully a school district was desegregating).

214. See, e.g., *Tate v. Bd. of Educ.*, 453 F.2d 975, 976 (8th Cir. 1972) (upholding the suspension of twenty-nine black students who exited a school pep rally in “quiet procession” to protest playing of “Dixie”); *Caldwell v. Craighead*, 432 F.2d 213, 215, 217 (6th Cir. 1970) (upholding the suspension of a black student from the band when he declined to play “Dixie” during a pep rally).

215. See, e.g., Sommer Ingram, *Newspapers Containing Editorial Critical of School's PE Program Confiscated*, SPLC (June 18, 2010), <http://www.splc.org/news/newsflash.asp?id=2108> (criticizing school principal for destroying student newspapers because of editorial proposing ways to reduce PE costs). For an examination of how to protect students speaking out on controversial issues in their school newspapers, see Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier* (Aug. 15, 2012) (unpublished article), available at [http://works.bepress.com/tyler\\_buller/2/](http://works.bepress.com/tyler_buller/2/).

216. See, e.g., *Scoville v. Bd. of Educ.*, 425 F.2d 10, 11, 14–15 (7th Cir. 1970) (finding that the complaint challenging the expulsion of students for the on-campus distribution of an underground newspaper containing criticism of school policies and officials demonstrated an unjustified invasion of First Amendment rights).

217. See, e.g., Valerie Strauss, *A Student Play Blasting N.Y. School Reform is Banned*, WASH. POST (Dec. 23, 2010, 1:41 PM), <http://voices.washingtonpost.com/answer-sheet/school-turnaroundsreform/a-student-play-criticizing-sch.html>.

218. See *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (rejecting school's claim that students' wearing of “scab” buttons to express opposition to use of replacement teachers during teachers' strike would be “inherently disruptive”).

219. See *Karp v. Becken*, 477 F.2d 171, 173, 176 (9th Cir. 1973) (concluding that students could not be disciplined for bringing signs to school to protest school's refusal to renew English teacher's contract but that the school could take away the signs based on forecast of disruption).

recitation of the Pledge of Allegiance.<sup>220</sup> They have protested against school uniform policies,<sup>221</sup> staged write-in campaigns in opposition to limits on who is eligible to be a student government officer,<sup>222</sup> objected to perceived irregularities in ballot counting in a vote on a class t-shirt design,<sup>223</sup> urged a boycott of a school fund-raising drive,<sup>224</sup> and registered their opposition to school budget cuts.<sup>225</sup> School discipline policies and their allegedly inequitable or unreasonable application have repeatedly drawn student ire,<sup>226</sup> and students continue to rally on behalf of minority constituencies victimized by administrator prejudice.<sup>227</sup>

---

220. See *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1281, 1285–86 (11th Cir. 2008) (per curiam) (rejecting high school junior’s First Amendment challenge to Florida statute requiring students to obtain parental permission in order to be excused from reciting Pledge); cf. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (finding that genuine issue of material fact existed as to whether paddling of student who silently raised his fist during daily flag salute was motivated by desire to suppress what the teacher and principal viewed as student’s supposedly unpatriotic viewpoint).

221. See *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 636 (D.N.J. 2007) (enjoining the threatened suspension of fifth graders for wearing buttons with words “No School Uniforms” and red slashed circle printed over a photograph of uniformed Hitler Youth).

222. See, e.g., *Bull v. Dardanelle Pub. Sch. Dist. No. 15*, 745 F. Supp. 1455, 1457–61 (E.D. Ark. 1990) (rejecting a student’s claim that the rule requiring students seeking office to obtain approval from two-thirds of student’s current teachers had been applied to retaliate against “outspokenness” but noting that the school had decided to amend policy after filing of suit to specify the criteria teachers should use in evaluating students and allowing appeals procedures for students denied requisite teacher approval).

223. See *Brandt v. Bd. of Educ.*, 480 F.3d 460, 462–63, 467 (7th Cir. 2007) (rejecting eighth graders’ First Amendment challenge to rule banning clothing with “inappropriate word[s] or slogans” as applied to shirts worn to protest perceived irregularities in voting to select school t-shirt design).

224. See *Hatter v. L.A. City High Sch. Dist.*, 452 F.2d 673, 674–75 (9th Cir. 1971) (reversing the district court’s finding that students suspended for distributing “Boycott Chocolates” flyers did not address issue of “sufficient social importance” to merit First Amendment protection).

225. See *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 99, 108 (2d Cir. 2009) (denying plaintiffs’ motion for attorneys’ fees in light of the district’s voluntary reduction of suspension term).

226. See, e.g., *Farrell v. Joel*, 437 F.2d 160, 161–63 (2d Cir. 1971) (upholding the punishment of a student who participated in sit-in to protest the suspension of three classmates); *Acevedo v. Sklarz*, 553 F. Supp. 2d 164, 167–70 (D. Conn. 2008) (rejecting the claim that a student’s suspension and arrest for refusing the principal’s demand that he stop filming police officer’s alleged use of excessive force on another student in school hallway violated his clearly established First Amendment right); *Dodd v. Rambis*, 535 F. Supp. 23, 30–31 (S.D. Ind. 1981) (upholding a high school’s expulsion of students for distributing leaflets urging classmates to stage a walk-out to protest discipline policies in light of the disruption caused by a related walk-out).

227. See *Gillman ex rel. Gillman v. Sch. Bd.*, 567 F. Supp. 2d 1359, 1361, 1379 (N.D. Fla. 2008) (invalidating the suspension of a student for violating rule that prohibited wearing or displaying symbols or messages urging fair treatment and acceptance of persons who are gay; the ban was imposed after the student began to organize a

Some student dissenters whose efforts were rebuffed by school authorities may have been ahead of their time, urging, for example, reluctant school authorities to confront how emerging conceptions of gender equality and identity should alter outdated dress code rules.<sup>228</sup> Other student voices have pressed claims exposing resistance to and anxiety about societal transitions reflecting an evolving understanding of how our constitutional commitment to equal protection defines schools' corresponding legal duties.<sup>229</sup>

---

campaign to protest an administrator's flagrant hostility to gay student and inaction against anti-gay bullying).

228. See, e.g., *Press v. Pasadena Indep. Sch. Dist.*, 326 F. Supp. 550, 552, 559 (S.D. Tex. 1971) (upholding the suspension of an eighth-grade girl who organized a march at school protesting rule barring girls from wearing "any type of trouser garment"). Some of the protesting students had worn pantsuits to school. *Id.* at 560. Plaintiff Sabrina Press marched wearing a maxi dress over a pantsuit, later lending the dress to another girl who faced suspension if she did not change out of her pantsuit. Ms. Press initiated the march after collecting a thousand signatures on a petition calling for an end to the no-trousers-for-girls rule and submitted the petition to the school district, which had refused to change the rule. *Id.* at 558; see also *Complaint Against Rickey Clopton, Copiah County School District, and Ronald Greer* ¶ 3, *Sturgis v. Copiah Cnty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355 (S.D. Miss. Sept. 15, 2011) (challenging the school district's refusal to include the plaintiff's senior portrait in her high school yearbook because she had chosen to wear a tuxedo rather than the drape customarily worn by female students). Ceara Sturgis and the school reached a settlement, and the suit was dismissed with prejudice on May 1, 2012. *Order Dismissing Case, Sturgis v. Copiah Cnty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355 (S.D. Miss. Sept. 15, 2011).

229. See, e.g., *Nuxoll ex rel. Nuxoll v. Ind. Prairie Sch. Dist.*, No. 204, 523 F.3d 668 (7th Cir. 2008) (finding likelihood of success in a student's claim that the school could not prevent him from wearing "Be Happy, Not Gay" t-shirt to express opposition to "Day of Silence" observance in which students and school officials took forms of symbolic action to draw attention to harassment and stigmatization of gay students); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (finding no First Amendment violation in the suspension of a student who wore a t-shirt that said "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back; the student asserted that he wore the shirt to express his religious belief and to convey opposition to the school's observance of "Day of Silence"); *vacated*, 549 U.S. 1262 (2007); *Crosby ex. rel. Crosby v. Holsinger*, 852 F.2d 801, 802 (4th Cir. 1988) (upholding a Virginia high school principal's decision to end the use of "Johnny Reb" mascot despite objections voiced by some students through a petition drive, ribbon-wearing campaign, and statements at school board meetings. Principal had taken no disciplinary action against students opposing mascot change and had not restricted their expressive activities); *Melton v. Young*, 465 F.2d 1332, 1333 (6th Cir. 1972) (upholding the suspension of a student who wore Confederate flag emblem on his jacket after the school district, facing ongoing racial tension and confrontations between students three years after desegregating, discontinued the use of "Dixie" as the school's pep song and the Confederate flag as the school symbol).

*B. Dismissing the Student Critic: Errors and Alternatives*

The Sixth Circuit's ruling in *Lowery v. Euverard*<sup>230</sup> and the Third Circuit's decision in *Walker-Serrano ex rel. Walker v. Leonard*<sup>231</sup> offer a useful starting place for an examination of the appropriate constitutional protection owed student petition and protest activities in school. In both cases, school officials punished or curtailed student petition efforts, and reviewing courts upheld the officials' actions.<sup>232</sup> By identifying the deficiencies in these opinions and noting that alternative analytical approaches have protected student speech in similar circumstances, this Section invites consideration of how both schools and courts should translate what the Constitution demands in such situations.

*1. Demanding unquestioning obedience: Lowery v. Euverard*

In *Lowery v. Euverard*, four members of a varsity football team drafted and circulated a short, unsophisticated petition that they planned to present to the principal as the 2005 season ended.<sup>233</sup> The petition was not eloquently phrased, stating simply "I hate Coach Euverard [sic] and I don't want to play for him."<sup>234</sup> The boys acted in response to what they saw as the head football coach's abusive, unfair, and unproductive treatment of players.<sup>235</sup> The drafters and signers, eighteen of the team's thirty-seven players, hoped that the head coach would be removed by the school district at the end of the season.<sup>236</sup> However, when Euverard learned about the petition in early October, each player who had signed the petition was led by an

230. 497 F.3d 584 (6th Cir. 2007).

231. 325 F.3d 412 (3d Cir. 2003).

232. For further discussion of *Lowery* and *Walker-Serrano*, see *infra* Part III.B.1.

233. *Lowery*, 497 F.3d at 585.

234. *Id.* The brief for Euverard and the other members of the coaching staff asserted that, because no specific remedy was sought in the text of the circulated document, it should not be treated as a petition. Final Brief of Defendants Appellants Marty Euverard et al. at 9, *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007) (No. 06-6172).

235. *Lowery*, 497 F.3d at 585. Coach Euverard's three year record at Jefferson County High was 6-13. Jeff Lockridge, *BGA Gains from Euverard Return*, TENNESSEAN, Mar. 20, 2007, at C.2. The alleged misconduct included punching players in the head, failing to stop other members of the coaching staff from using unnecessary force with players, repeatedly humiliating and cursing at the team, tearing up the college recruiting letters of players with whom Euverard was displeased, and imposing a year-round conditioning program in violation of applicable league rules. Final Brief of Defendants Appellants Marty Euverard et al., *supra* note 234, at 9-10.

236. Final Brief of Defendants Appellants Marty Euverard et al., *supra* note 234, at 10-14 (noting that a number of players who objected to Euverard's conduct had already quit the team before the petition was circulated and that three prominent players, including the starting quarterback, had joined the petition effort). There were no allegations that anyone had been harassed or pressured to sign the petition. *Id.* at 12.

assistant coach into an office where, apart from any other students, he faced the irate head coach.<sup>237</sup> If the player refused to apologize and say that he wanted to play for Euverard, the player was dismissed from the squad.<sup>238</sup> This action threatened to end the students' high school football careers, foreclosing a route from the rural Tennessee community to college via an athletic scholarship.<sup>239</sup>

The school's principal and district officials sided with the coach and would not reverse the decision to kick Derrick Lowery, Randy Giles, Joseph Dooley, and Dillon Spurlock off the squad permanently.<sup>240</sup> No investigation of Euverard's behavior appears to have been undertaken by the district.<sup>241</sup> Instead, the principal reportedly told plaintiff Spurlock that he had been "stupid" to sign the petition, saying it was "the wrong way" to address the situation.<sup>242</sup>

The players initiating the petition in *Lowery* had identified potentially serious misconduct, worthy of investigation by their school system. Recent headlines raise the specter of coaches engaging in sexual or physical abuse of young athletes, conduct that exacts an enormous human toll and creates serious legal consequences for the schools involved.<sup>243</sup> Coaches' disregard of players' health by pushing practices beyond recommended limits has also prompted public concern and legal action.<sup>244</sup> Thus, it is not hard to envision

---

237. *Lowery*, 497 F.3d at 586. The boys who had circulated the petition appeared fearful that the encounter with the coaching staff could be physically threatening based on the coaches' prior behavior. See Final Brief of Plaintiffs/Appellees, *supra* note 234, at 22–23 (recounting incident in which a student was grabbed by the throat by an assistant coach, prompting the student to quit the team).

238. See Final Brief of Defendants Appellants Marty Euverard et al., *supra* note 234, at 28 (explaining that Euverard "forgave" any players who admitted signing the petition and apologized for doing so).

239. Jefferson County High was the only public high school serving in the county and offered the only high school football program (public or private) in the county. *Id.* at 7. Two of the four plaintiffs, unable to move or to afford private school, could not play again. *Id.* at 52.

240. *Id.* at 26–27.

241. *Id.* at 26.

242. *Id.* at 25–26. Speaking with a player's mother shortly after the players were dismissed, the district's Director of Schools made the following remark: "You probably don't want to know my ideas on student petitions, do you?" *Id.* at 26–27.

243. See Jesse McKinley, *After Penn State Case, Coaches Face New Scrutiny*, N.Y. Times, Apr. 15, 2012, at A18 (noting that in the wake of child sexual abuse allegations against a former member of Penn State coaching staff, there was a surge of state legislative initiatives subjecting youth sports coaches to additional scrutiny before hiring, such as criminal background checks, and including coaches among mandated reporters of suspected child physical or sexual abuse).

244. Football coaches have faced civil and criminal liability when student athletes died during summer practices in intense heat. See, e.g., *Kentucky High School Football Coach Charged with Reckless Homicide in Player's Death*, FOX NEWS (Jan. 22, 2009), <http://www.foxnews.com/story/0,2933,481645,00.html>. A jury acquitted the coach of both reckless homicide and wanton endangerment charges, but the deceased player's family asserted that the charges had brought about needed changes in

circumstances in which student athletes justifiably petition for the correction of administrators' lax oversight of athletic staff.

Testifying at trial, the students who signed the petition emphasized that they wanted to play football for their school; they simply did not want to be subjected to the humiliation and abuse Coach Euverard had used, very unsuccessfully, to motivate the players.<sup>245</sup> Coach Euverard claimed at trial that he had not dismissed the players because of the petition but because of their insubordinate refusal to do what he demanded in the confrontation about the petition.<sup>246</sup> Trial testimony from Euverard and other members of the coaching staff confirmed that the students had not refused to follow directions during practices or spoken disrespectfully to any member of the coaching staff prior to the discovery of the petition.<sup>247</sup> The school defendants contended that Coach Euverard's behavior could not be questioned without undermining the ability of the football program to advance its goal of "the overall development of the student athlete, teaching leadership, responsibility and life skills."<sup>248</sup> Dismissively characterizing the extension of constitutional protection to the students' petition as what would, in effect, be a "license to be insubordinate and discourteous" to school personnel,<sup>249</sup> the defendant coaches went on to argue, without any apparent sense of irony, that protecting the students' speech and invalidating their removal from the team would undermine the school's recognized

---

schools' practice policies. Jason Riley, *Stinson Found Not Guilty in PRP Player's Death*, COURIER-J. (Sept. 17, 2009, 11:32 PM), <http://www.courier-journal.com/article/20090917/SPORTS05/909170320/Stinson-found-not-guilty-PRP-player-s-death>; see also *School District Reaches Agreement in High School Player's Death*, USA TODAY (Sept. 9, 2009, 2:49 PM), [http://www.usatoday.com/sports/preps/football/2009-09-09-montana-death-settlement\\_N.htm](http://www.usatoday.com/sports/preps/football/2009-09-09-montana-death-settlement_N.htm) (reporting that a school district agreed to settle with the parents of a seventeen-year-old football player who collapsed and died after practicing during intense heat and smoky conditions). Practicing under such weather conditions contradicts the recommendations of the National Athletics Trainers Association. Paul J. Weber, *Despite Deaths, Schools Resist Changing Heat Plans*, FOX NEWS (Sept. 14, 2009), [http://www.foxnews.com/printer\\_friendly\\_wires/2009Sep14/0,4675,FBHHeatGuidelines,00.html](http://www.foxnews.com/printer_friendly_wires/2009Sep14/0,4675,FBHHeatGuidelines,00.html); see also Anahad O'Connor, *Trying to Reduce Head Injuries, Youth Football Limits Practices*, N.Y. TIMES, June 14, 2012, at A1 (describing how youth football programs are modifying training in response to evidence of special danger that concussions pose for younger players).

245. See Final Brief of Defendants Appellants Marty Euverard et al., *supra* note 234, at 16 (noting that team record had been 2–4 before petition had been drafted).

246. *Id.* at 22.

247. See Final Reply Brief of Appellants Marty Euverard et al. at 8, *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007) (No. 06-6172) (citing the trial testimony of plaintiff Dillon Spurlock that he loved football and wanted to play for Jefferson County but did not want to play for Euverard because he had no respect for him).

248. Final Brief of Defendants Appellants Marty Euverard et al., *supra* note 234, at 41–42.

249. *Id.* at 42.

authority to “teach by example the shared values of a civilized social order.”<sup>250</sup>

The Sixth Circuit panel opinion proceeded from the premise that students’ speech rights would necessarily be constrained because “[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students.”<sup>251</sup> The court stressed the following:

Public schools are necessarily not run as a democracy. Schools exist to provide a forum whereby those with wisdom and experience (the teachers) impart knowledge to those who lack wisdom and experience (the students). Unlike our system of government, the authority structure is not bottom-up, but top-down. The authority of school officials does not depend upon the consent of the students. To threaten this structure is to threaten the mission of the public school system.<sup>252</sup>

*Tinker’s* disruption standard had to be adapted to the special demands of a high school football program, an environment where “execution of the coach’s will is paramount” because the coach determines how best to achieve the team’s principal goal of winning athletic competitions.<sup>253</sup> The petitioning players effectively sought a “right to belong to the Jefferson County football team on their own terms”<sup>254</sup> and sought to establish a “right to unilaterally undertake a referendum on the coach’s authority.” The players, the majority reasoned, wanted “a bottom-up authority structure for high school athletics,” but “[a] high school athletic team could not function smoothly with an authority structure based on the will of the players.”<sup>255</sup> Concluding the school officials could have anticipated that a “material and substantial” disruption would result from the petition, the majority held that the school could, under *Tinker*,<sup>256</sup> remove the players based solely on their circulation of the petition. The majority brushed aside the students’ argument that school officials had failed to offer specific evidence of actual or foreseeable disruption, reasoning that concepts like team morale and unity are

---

250. *Id.* at 43 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

251. *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007).

252. *Id.*

253. *Id.* at 589 (quoting *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995)).

254. *Id.* at 589.

255. *See id.* at 591. The majority contrasted the events at issue in *Lowery* with circumstances in which student athletes’ communication of grievances could be protected, such as when a coach had “put his authority into play.” *Id.* (citing *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755 (9th Cir. 2006)). For further discussion of *Pinard*, see Part III.B.2.

256. *Lowery*, 497 F.3d at 591–92.



not quantifiable, despite their important impact on a team.<sup>257</sup> Returning to the opinion's central theme and with no apparent unease about defending Coach Euverard's claimed entitlement to the students' unquestioning obedience, the court elaborated:

The success of an athletic team in large part depends on its coach. The coach determines the strategies and plays, and "sets the tone" for the team. The coach, particularly at the high school level, is also responsible for providing "an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team." . . . The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline. Thus, attacking the authority of the coach necessarily undermines his ability to lead the team . . . . Plaintiffs' circulation of a petition stating "I hate Coach Euvarad [sic] and I don't want to play for him" was a direct challenge to Euverard's authority, and undermined his ability to lead the team. It could have no other effect.<sup>258</sup>

To bolster its conclusion that *Tinker* offered no protection for the players' petition, the majority drew parallels between school officials' concerns and those of a public employer facing a disgruntled employee.<sup>259</sup> Comparing the athletes' claims to those of government workers and drawing on the principles laid out in the then-controlling Supreme Court public employee speech precedents, *Pickering v. Board of Education*<sup>260</sup> and *Connick v. Myers*,<sup>261</sup> the majority found a further flaw in the students' claim.<sup>262</sup> Their speech failed to address what the court would classify as a matter of public concern.<sup>263</sup> Despite the underlying accusations of bullying and misuse of power levied by the players against Euverard, their petition did not represent a "whistleblower situation."<sup>264</sup>

Concurring in the result on the ground that school officials could properly claim qualified immunity due to the lack of clearly

---

257. *Id.* at 593.

258. *Id.* at 594. The court then speculated that the petitioning players might try to increase the likelihood that the school district would fire Euverard by playing poorly, producing losses for their team and sowing divisions among players as losses mounted. *Id.* at 594–95.

259. *Id.* at 597. The *Lowery* majority, however, saw the speech of student athletes as less likely to be protected than that of public employees given the closely supervised, highly regulated status of high school team members and the voluntary character of sports participation. *Id.* at 600.

260. 391 U.S. 563 (1968).

261. 461 U.S. 138 (1983).

262. *Lowery*, 497 F.3d at 597–99.

263. *Id.* at 598 n.5.

264. *Id.* at 600.

established law addressing similar facts, Judge Gilman sharply criticized the majority's treatment of the students' First Amendment claims.<sup>265</sup> To Judge Gilman, school officials had not, as *Tinker* required, shown a reasonable basis for anticipating substantial disruption of or material interference with school activities.<sup>266</sup> In addition, he objected vigorously to "grafting" a public concern requirement onto the *Tinker* formula, potentially narrowing the protection afforded student speech.<sup>267</sup>

2. *Probing for retaliatory motive: Pinard v. Clatskanie School District 6J*

Cataloguing the majority opinion's deficiencies in *Lowery*, Judge Gilman called attention to the fact that the court had declined to follow the Ninth Circuit's persuasive analysis of very similar claims in *Pinard v. Clatskanie School District 6J*.<sup>268</sup> In *Pinard*, members of an Oregon high school varsity basketball team faced abusive treatment from their coach.<sup>269</sup> While berating the students for poor play, the coach had presented this choice: They could either quit the team or ask for his resignation and he would go.<sup>270</sup> The team co-captains then called a meeting at which all players attending, with the exception of the coach's son, decided to draft a petition seeking the coach's resignation.<sup>271</sup> The boys delivered the petition to the coach the next day at school, and he immediately brought it to the school principal and the district superintendent.<sup>272</sup> The principal advised the coach not to resign at that time, and the superintendent proposed meeting with the players to get more information about the situation. Saying

---

265. *Id.* at 601, 606 (Gilman, J., concurring in the judgment).

266. *Id.* at 601.

267. *Id.*

268. 467 F.3d 755 (9th Cir. 2006).

269. The players alleged that the coach, Jeff Baughman, subjected them to physical intimidation, slapping and hitting them, as well as tirades laced with profanity and demeaning taunts. *Id.* at 760.

270. *Id.* at 760 n.6.

271. *Id.* at 760. The petition read as follows:

As of February 12, 2001, the Clatskanie Tigers Boys Varsity Basketball Team would like to formally request the immediate resignation of Coach Jeff Baughman. As a team we no longer feel comfortable playing for him as a coach. He has made derogative [sic] remarks, made players uncomfortable playing for him, and is not leading the team in the right direction. We feel that as a team and as individuals we would be better off if we were to finish the season with a replacement coach. We, the undersign [sic], believe this is in the best interest of the team, school, town, and for the players and fans. We would appreciate the full cooperation of all the parties involved.

*Id.* at 760–61. Under their signatures the players typed the following: "[W]e will not be approached individually on this. This was a team decision and we will be addressed as a team." *Id.* at 761.

272. *Id.*

he felt “upset and hurt” by the petition, the coach asked for and received permission to take the rest of the day off.<sup>273</sup>

After leaving the school the coach called another member of the coaching staff, telling him that he “wanted to know who his backstabbers were” and that he planned “to corner the little sons-of-bitches and not give them an out.”<sup>274</sup> The coach reported that the principal had responded to the petition by offering two options: He could resign or he could “tell the players to either get on the bus and play or if they chose not to board the bus to turn in their uniforms.”<sup>275</sup> The coach claimed that the principal and school athletic director urged him to pursue the second option.

The principal met with the players, who stated that they would not want to continue to play if the coach remained in charge.<sup>276</sup> The principal advised the team members that an investigation would have to be conducted before the coach could be removed. The players were told they could either take part in a mediation to be conducted by the principal and athletic director and play for the school that night or, if they declined to enter mediation, forfeit the privilege of playing in the game.<sup>277</sup> The players did not remember being told that they would be suspended from the team if they refused to play that night, and the principal could not recall giving such a warning.<sup>278</sup> The students were not told that the coach had informed the principal he did not want to coach the game and that a replacement coach had been enlisted.<sup>279</sup> Believing that Jeff Baughman, the coach, would be at the game, the petitioning players decided not to participate.<sup>280</sup> With junior varsity players as replacements, the team suffered a 50 point loss. The signers later testified that they would have played had they known Baughman would not be there.<sup>281</sup>

Meeting the next day with the signers’ parents, the principal informed them that their sons were permanently suspended from the team for not attending the game.<sup>282</sup> After appealing the sanction to

---

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 762 & n.8.

279. *Id.* at 762.

280. *Id.* One signer, a team co-captain whose father was the school’s assistant athletic director, decided to participate in the game.

281. *Id.*

282. *Id.* The school’s Code of Conduct and Appearance for Athletes stated that athletes “will travel to and from contests with coach and team” unless specifically given permission not to do so and authorized that “an athlete may be disciplined for conduct termed detrimental to the team and/or school.” *Id.* at 762 n.11. The

the school board, which upheld the principal's decision, the students filed suit in federal district court asserting that they had been punished for exercising their First Amendment rights.<sup>283</sup> The district court granted the school district's motion for summary judgment, finding that the players' petition was not constitutionally protected because it did not address a matter of public concern and instead resembled the unprotected private grievance of an employee, lacking any "political dimension."<sup>284</sup> Offering an alternative ground for the summary judgment grant, the district court reasoned that the students' speech had "substantially and materially interfered with a school activity" and could therefore be punished even if it would otherwise be considered protected speech.<sup>285</sup>

Reversing the district court, the Ninth Circuit found that the players' petition and the complaints they presented about the coach in their meeting with school administrators were "pure speech."<sup>286</sup> Relying on *Tinker*, the panel reasoned that the players could only be punished if the officials could cite facts forming a reasonable basis for forecasting that the petition would cause "substantial disruption of or material interference with school activities."<sup>287</sup> The panel emphasized that *Tinker* supplied the relevant framework for analyzing student speech that is not school-sponsored and that is not lewd, vulgar, obscene, or plainly offensive.<sup>288</sup> The panel further emphasized that, unlike public employee speech precedents, *Tinker* did not require students to address a matter of public concern to merit First Amendment protection.<sup>289</sup> Having shown no reasonable basis for projecting that the students' presentation of the petition and their meeting with the principal and school athletic director would cause disruption or harm others in the school, school officials could not punish the petitioning students.<sup>290</sup> Although acknowledging that students' refusal to play in the evening game might be considered

---

school district later cited the Code as the basis for the players' suspension, but the principal, who had made the suspension decision, admitted he was not familiar with its provisions. *Id.* at 762.

283. *Id.* at 763.

284. *Id.*

285. *Id.*

286. *Id.* at 764.

287. *Id.*

288. *Id.* at 765.

289. *Id.* The court did note, however, that because the players complained about "the school's performance of its duties to supervise its teachers, monitor extracurricular activities and provide a safe and appropriate learning environment for its students," they did address "matters of public concern," had that been the relevant standard. *Id.* at 767 n.18.

290. *Id.* at 768.

expressive conduct subject to First Amendment protection, the Ninth Circuit concluded that the refusal or “boycott” did materially interfere with the school’s athletic program and could justify the students’ suspension under *Tinker*.<sup>291</sup> Nonetheless, the panel saw the factual record as “not sufficiently clear” as to whether the students’ refusal to play was in fact what prompted their suspension.<sup>292</sup> The school officials had failed to tell the players that the coach would not be at the game even though the officials could anticipate the coach’s absence might alter the players’ decision to sit out the game.<sup>293</sup> That omission suggested that the officials might be using the players’ refusal to play as a pretext, attempting to conceal that the boys were suspended in retaliation against their protected petitioning activity.<sup>294</sup> The Ninth Circuit therefore remanded the case for the district court to examine the retaliatory motive question.<sup>295</sup>

The students prevailed on remand, defeating the school district’s motion for summary judgment.<sup>296</sup> Examining only the question of whether school officials had demonstrated that the suspensions would have been imposed even if the students had not complained about the coach in their petition, the district court found that the evidence did not support the district.<sup>297</sup> The court looked at the timing of the suspension, school officials’ expressed opposition to the students’ speech, and other evidence that the claimed disruption of the game was used as a pretext to conceal a retaliatory response to the students’ complaints.<sup>298</sup> The proximity in time between the presentation of the petition and the suspension supported the inference that the players were suspended, at least in part, for their speech.<sup>299</sup> Because the principal had told the petitioning players that he supported the coach, his offer to serve as a mediator of the dispute presented the boys with a “Hobson’s choice,” precipitating their boycott of the game and making the petition activity and the boycott an undivided continuum of events rather than separable incidents.<sup>300</sup> The choice presented to the players appeared designed to “goad or trick [them] into sanctionable behavior” that they might

---

291. *Id.* at 769.

292. *Id.* at 770.

293. *Id.* at 768.

294. *Id.* at 770.

295. *Id.*

296. *Pinard v. Clatskanie Sch. Dist.* 6J, No. 03-172-HA, 2008 WL 410097, at \*6 (D. Or. Feb. 12, 2008).

297. *Id.* at \*5.

298. *Id.* at \*3–4.

299. *Id.* at \*3.

300. *Id.*

not have undertaken had they been properly informed.<sup>301</sup> Perhaps most significantly, the court found that the coach, whose conduct was the focus of the students' complaints, appeared to have had the ability to influence, perhaps even determine, the principal's response to the students' complaints. When the petition was presented, the principal had been a candidate for district superintendent, and the coach was one of three members of an applicant screening committee.<sup>302</sup> The principal's eagerness to acquire or maintain the coach's support for his candidacy could foreseeably have altered his response to the students' grievances, making a retaliatory reaction more plausible.

3. *Underestimating the young critic: Walker-Serrano ex rel. Walker v. Leonard*

In early February 1999, third grader Amanda Walker-Serrano tried to gather signatures from her classmates on a handwritten petition that presented this appeal: "We 3<sup>rd</sup> grade kids don't want to go to the circus because they hurt animals. We want a better feild [sic] trip."<sup>303</sup> Looking to inform other students at Lackawanna Trail Elementary about how circuses mistreat performing animals and to persuade them to join her in asking school officials to change the planned April trip to the Shriners Circus, Amanda had taken her petition onto the playground at recess, garnering thirty signatures the first day she brought it outside.<sup>304</sup> The next day, according to the school district's account, a teacher saw a group of children gathered around Amanda. The group was near a patch of ice, and, as the teacher approached to investigate what they were doing, she encountered a crying child who had slipped on the ice.<sup>305</sup> Although the child's fall may have had no connection to Amanda's activities, the teacher admonished Amanda, saying, "you can't have that here."<sup>306</sup> The school district contended that this remark was an expression of concern that the writing implements used to sign the petition could lead to injuries on the slippery playground.<sup>307</sup> A teacher also reported observing children coming to Amanda's desk to talk to her during daily quiet reading time, and, seeing the petition on Amanda's desk, had concluded that

---

301. *Id.* at \*6.

302. *Id.* at \*4.

303. Walker-Serrano *ex rel. Walker v. Leonard* (*Walker-Serrano II*), 325 F.3d 412, 414 (3d Cir. 2003).

304. Walker-Serrano *ex rel. Walker v. Leonard* (*Walker-Serrano I*), 168 F. Supp. 2d 332, 335 (M.D. Pa. 2001), *aff'd*, 325 F.3d 412.

305. *Walker-Serrano II*, 325 F.3d at 414.

306. *Walker-Serrano I*, 168 F. Supp. 2d at 335.

307. *Walker-Serrano II*, 325 F.3d at 414 n.1.

the children were speaking to Amanda about it rather than doing their schoolwork.<sup>308</sup> According to the school district, after the principal learned about the petition, she told teachers they should advise Amanda that she was prohibited from circulating the petition on school grounds.<sup>309</sup>

When Amanda's parents' contacted the school board president to complain about the principal and teacher stopping her from circulating the petition, the school district's counsel sent them a letter which revealed that the district saw petitioning as an unsuitable activity for elementary school children: "Elementary schools are not generally the environment for petition circulation, particularly where parents are totally unaware of such activities. It is incumbent upon school authorities, particularly in an elementary school setting, to preserve an appropriate environment focused on the institution's instructional objectives."<sup>310</sup> Amanda's parents would later point out that a social studies textbook used by her class specifically suggested that, as a learning exercise, students could "circulate a petition on a matter of community concern."<sup>311</sup>

In a second letter, the district's lawyer seemed to offer a different explanation of why Amanda's signature gathering had been shut down: her failure to submit her petition for prior review by school officials.<sup>312</sup> Amanda's parents alleged that the prior review policy was only invoked as a post hoc justification for stopping her petition activities and contended that the cited policy had not been enforced.<sup>313</sup>

---

308. *Walker-Serrano I*, 168 F. Supp. 2d at 336.

309. *Id.*

310. *Id.* Educational research has, in fact, contradicted this view. See Ethel Sadowsky, *Taking Part: Democracy in the Elementary School*, in *PREPARING FOR CITIZENSHIP: TEACHING YOUTH TO LIVE DEMOCRATICALLY* 151, 151–64 (Ralph Mosher et al. eds., 1994) (describing children's effective advocacy in elementary school community meetings); Clarissa Sawyer, *Democratic Practices at the Elementary School Level: Three Portraits*, in *PROMISING PRACTICES IN TEACHING SOCIAL RESPONSIBILITY* 87, 87–103 (Sheldon Berman & Phyllis LaFarge eds., 1993) (describing successful experiments that gave students significant input into and responsibility for classroom and school governance at the elementary and secondary level).

311. *Walker-Serrano II*, 325 F.3d at 418.

312. The cited district policy, Policy 220, stated the following:

The Board shall require that students who wish to distribute materials submit them for prior review. Where the reviewer cannot show within two school days that the materials are unprotected, such materials may be distributed . . . . The Superintendent shall develop rules and regulations for the distribution of printed material which shall include: procedure for the prior review of all materials to be distributed.

*Walker-Serrano I*, 168 F. Supp. 2d at 336–37.

313. *Id.* at 337. The Walker-Serranos had asserted that the school had allowed a pro-circus petition to be circulated without any prior review, but the trial court noted

A few days before the circus trip, the school did allow Amanda to give her classmates stickers and coloring books that criticized circuses' cruelty to performing animals.<sup>314</sup> She did not go on the trip and stood with her mother in protest outside the circus venue.<sup>315</sup> While standing with her mother, Amanda faced teasing from some students from her school, including a group of boys who yelled "kill the animals" and "torture the animals."<sup>316</sup>

Amanda's experience drew local media attention. In late February, an editorial in the Scranton Tribune offered an acerbic assessment of the school's reaction to the petition, writing as follows:

Here in America, the international guardian of democracy, the last thing on earth we would want our public schools to do is encourage children to think for themselves and embrace democratic principles . . . . Whether circus animals are poorly treated is a matter of intense debate around the country. One would think that an educational institution would find a way to examine such an issue raised by a student instead of, in effect, telling her to shut up.<sup>317</sup>

Reviewing courts displayed less sympathy for Amanda's First Amendment claims. The district court held that Amanda's right to circulate her petition must be clearly established to overcome the school officials' qualified immunity defense.<sup>318</sup> The court noted that it had identified no cases specifically analyzing an elementary school student's constitutional right to petition at school and evaluated Amanda's claim by consulting the broader universe of student speech cases.<sup>319</sup> The district court found that the age of Amanda and her classmates created a basis for distinguishing her case from cases upholding the First Amendment rights of high school students to distribute literature on campus.<sup>320</sup> Looking at Amanda's actions and her principal's and teachers' responses, the court saw the officials as heeding *Tinker's* admonition that they "must be able to show that

---

that they had "presented no evidence that school officials were aware of the existence of another petition." *Id.* at 346.

314. *Id.* at 344.

315. *Id.* at 337.

316. *Id.* The case record does not indicate whether the boys were disciplined.

317. Lynn Manheim, *Amanda Walker-Serrano*, in *SPEAKING OUT FOR ANIMALS: TRUE STORIES ABOUT REAL PEOPLE WHO RESCUE ANIMALS* 215, 216 (Kim W. Stallwood ed., 2001). An editorial cartoon was also spotlighted the controversy. It depicted a little girl holding a document labeled "First Amendment" in one hand and a paper labeled "Circus Petition" in the other. She faced a ringmaster, wearing a jacket saying "Lacka. Trail Elem." and armed with a bullwhip as he wielded a chair in an apparent effort to fend off the child. *Id.*

318. *Walker-Serrano I*, 168 F. Supp. 2d at 341.

319. *Id.* at 342.

320. *Id.* at 341.



[their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”<sup>321</sup> In the court’s view, the officials had acted reasonably to prevent disruption in the classroom and potential injury on the playground, and their reactions did not reflect hostility to her anti-animal cruelty message given that she had the opportunity to pass out the stickers and coloring books and had not been formally punished.<sup>322</sup> The opinion did not address the implications of recognizing Amanda’s speech activities as a criticism of school officials’ field trip choices—a characterization that could have triggered more careful exploration of the motivation behind the school personnel’s reaction to Amanda’s activities.

The district court did recognize, however, the right of juveniles to petition the government under the First Amendment.<sup>323</sup> The court concluded that Amanda’s right to petition had been satisfactorily respected by allowing the child’s position to be presented to the school board by her parents and by authorizing the distribution of the stickers and coloring books to her classmates although the latter are a non-governmental audience.<sup>324</sup> Because the court viewed the student’s petition right as encompassed within her speech rights, her expression could be restricted in accordance with *Tinker*’s anti-disruption rationale.<sup>325</sup>

Upholding the district court’s ruling, the Third Circuit panel opinion stressed that “the First Amendment has never been interpreted to interfere with the authority of schools to maintain an environment conducive to learning.”<sup>326</sup> The panel observed that the balance between students’ First Amendment rights and schools’ need for order must reflect special sensitivity to the age and maturity of the students involved, drawing on prior rulings in which the youth and impressionability of students justified restricting speech about human sexuality, as in *Fraser*, or limiting the distribution of religious literature.<sup>327</sup> The panel opinion conceded that elementary students had what were described as “qualified *Tinker* right[s]” but viewed those rights as generally “very limited” for third graders.<sup>328</sup>

---

321. *Id.* at 344 (quoting *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 509 (1969)).

322. *Id.* at 344–46.

323. *Id.* at 346.

324. *Id.* at 347.

325. *Id.* at 342, 344.

326. *Walker-Serrano II*, 325 F.3d 412, 416 (3d Cir. 2003).

327. *Id.* at 416–17.

328. *Id.* at 417.

Turning to Amanda's invocation of First Amendment protection for the circulation of her petition, the panel confronted longstanding precedent treating efforts to collect signatures on a petition as "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"<sup>329</sup> The panel did not tackle the challenge of clarifying the exact contours of elementary students' rights to engage in this form of political advocacy but refused to articulate a per se rule that such political advocacy would never be appropriate.<sup>330</sup> Citing the fact that she was not punished and that she was given permission to distribute anti-circus stickers and coloring books, the panel saw no hostility to Amanda's substantive position in the school officials' response to her petition.<sup>331</sup> The panel concluded that the school's response represented a constitutionally acceptable effort to avoid disruptions in the classroom and on the playground and to prevent her classmates' rights from being infringed.<sup>332</sup>

In a concurring opinion that sought to express his skepticism about Amanda's claimed "First Amendment right to collect signatures on a petition and thus have her fellow eight- or nine-year-old third grade students join her protest,"<sup>333</sup> Judge Greenberg asserted the following:

[I]t will be a rare case in which such conduct should be protected when the signatures are sought from children as young as those involved here, particularly in a school setting. I think that it is unlikely that the third grade children here could have had knowledge of how a circus treats its animals. After all, I have no such knowledge myself. Yet Amanda induced more than 30 of them to sign a petition that they did not want to go to the circus because it "hurt[s] animals." Of course, I recognize that even adults will sign petitions without understanding the issues involved and in doing so likely will be protected constitutionally, as will be the persons circulating the petitions. But the status of adults differs from that of children at school as in general public officers and agencies have no obligation to protect adults from their own conduct or the importuning by other persons.<sup>334</sup>

---

329. *Id.* at 418 (quoting *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988)).

330. *Id.*

331. *Id.* at 419.

332. *Id.* (treating the curtailment of Amanda's petition activities as simply the school's effort "to regulate the times and circumstances a petition may be circulated in order to fulfill its custodial and pedagogical roles").

333. *Id.* at 420 (Greenberg, J., concurring).

334. *Id.*

Deriding the view that “it is never too early for a person to learn to challenge authority,” Judge Greenberg connected his concerns to *Tinker’s* “rights of others” reservation and expressed apprehensions about an eight- or nine-year-old feeling pressured to sign a petition.<sup>335</sup> The judge also anticipated that parents might view elementary school petitions as an incursion on their parental prerogatives, writing that “parents do not send their children, particularly young children, to school in order for them to be solicited to state their opinions on matters of public concern or school administration.”<sup>336</sup> In his view, it is not appropriate to solicit the signatures of third grade children on a petition asking them to state their views without the advice and consent of the children’s parents.<sup>337</sup>

In contrast, Judge Fullam, a district judge sitting by designation, wrote separately to distance himself from his colleagues’ disparaging appraisal of the capacity of Amanda and her classmates to form and express a protectable perspective on the circus trip.<sup>338</sup> Rather than questioning Amanda’s right to circulate her petition, Judge Fullam focused only on whether, in light of a distinct likelihood of disruption, school officials could impose reasonable time, place, and manner restrictions on her activities, a more demanding standard that he believed could still support the district court’s ruling.<sup>339</sup>

The Third Circuit panel opinion in *Walker-Serrano* interpreted the fact that Amanda was not punished for her petitioning as effectively negating any inference that school officials had any improper, censorial motive.<sup>340</sup> School officials did, however, block her efforts to speak to her classmates about the petition in order to seek their signatures, thereby frustrating her classroom First Amendment experiment.<sup>341</sup> Under these circumstances, the absence of punishment mitigates but does not eliminate the First Amendment injury. Amanda’s expressive objectives included communicating her own views about circuses’ mistreatment of animals, seeking to persuade her classmates to share her position, and joining with likeminded classmates to ask that school officials offer a field trip that

---

335. *Id.* at 421.

336. *Id.* at 420.

337. *Id.*

338. *Id.* at 421 (Fullam, J., concurring).

339. *Id.*

340. *Id.* at 419 (majority opinion); cf. Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113 (2010) (arguing that when student speech triggers punishment school officials should be required to show that they provided adequate prior notice of the rule invoked and of the potential sanction and that the punishment imposed was reasonable).

341. *Walker-Serrano II*, 325 F.3d at 414.

did not involve supporting the objectionable circus enterprise. By appealing to her classmates to join her in voicing their concern for the circus animals and objecting to the school's chosen field trip, was Amanda interjecting ideas that were unsuitable and disturbing for young children? Was she threatening the ability of her classmates' parents to protect them from inappropriate influences? Or was she, to the alarm of school officials, introducing her fellow students to the idea that they could identify an injustice—the infliction of physical and emotional harm on confined wild animals—and challenge what the children saw as a bad decision by school officials to support that injustice? Allowing Amanda to distribute the stickers and coloring books appears to negate the first two posited explanations for the school officials' actions, making the disquieting third option most plausible and most consistent with the view first expressed by the school district that elementary schools are inappropriate settings for petition activities.<sup>342</sup>

4. *Experiencing citizenship in the classroom: Downs v. Conway School District*

Just as *Pinard* preserved a place for student petition activity in the high school setting, *Downs v. Conway School District*,<sup>343</sup> a case decided shortly after *Tinker*, illustrates that petitioning for redress of grievances can be affirmed as a vital, constructive part of an elementary school student's education for citizenship. In *Downs*, a second grade teacher had been dismissed after she and her young pupils sought several changes in school operations.<sup>344</sup> In the first incident, the teacher gave the principal drawings some of her students had made in art class. The children had been instructed to draw their classmates, conveying what they were feeling. Several students drew pictures of other children lying down, asking for water. Others drew wilted flowers. These images expressed the children's frustration that their water fountain had been broken for many weeks.<sup>345</sup> Later, after studying about food and nutrition, a student proposed writing a letter to the cafeteria supervisor asking for raw rather than cooked carrots in order to maximize the nutritional value

---

342. See *Walker-Serrano I*, 168 F. Supp. 2d 332, 336 (M.D. Pa. 2001) (discussing the district counsel's letter, which stated: "Elementary schools are not generally the environment for petition circulation, particularly where parents are totally unaware of such activities. It is incumbent upon school authorities, particularly in an elementary school setting, to preserve an appropriate environment focused on the institution's instructional objectives").

343. 328 F. Supp. 338 (E.D. Ark. 1971).

344. *Id.* at 342.

345. *Id.* at 339–42.

of their school lunches. A class workbook had suggested an initiative as part of the curriculum unit.<sup>346</sup> Members of the class prepared and signed a simple letter and asked for the teacher to sign with them, which she did.<sup>347</sup> The letter was mailed to the cafeteria supervisor but also drew the attention of the superintendent. During the period in which her students were voicing their concerns about their water fountain and their cafeteria fare, Ms. Downs had repeatedly complained to her principal and superintendent about the health and safety hazard posed by the operation of an open burning incinerator, which stood in the center of the school playground and ran throughout the school day. The incinerator emitted smoke, which sickened children and adults in the school, including Ms. Downs and some of her second graders. In addition, dangerous debris fell from the incinerator. Some children would be drawn to these burned and rusted materials, and others would sometimes try to ignite sticks or branches by inserting them into the incinerator during recess. Citing this series of events as instances of “insubordination,” “lack of cooperation with the administration,” and “teaching second graders to protest,” the school board, acting on the basis of the superintendent’s recommendation, refused to renew the teacher’s contract and ended her more than twenty-five years as, in her principal’s description, “a master teacher.”<sup>348</sup> To support his recommendation, the superintendent had invoked a Board of Education policy forbidding the circulation of petitions without the approval of the school superintendent.<sup>349</sup>

Reviewing Ms. Downs’ First Amendment challenge to her dismissal, the district court observed that “the superintendent demanded blind obedience to any directive he gave whether illegal, unconstitutional, arbitrary or capricious,” ignoring the legitimate character of all of the complaints and the orderly and restrained manner in which they were conveyed.<sup>350</sup> Allowing the teacher to be fired under these circumstances would, the court concluded, threaten the school’s ability to credibly convey an appreciation of basic constitutional principles.<sup>351</sup> Furthermore, the school district’s own policies exhorted its teachers to “demonstrate the principles of democracy at all times in the operation of [their] classroom[s;] thereby providing each child with the opportunity to develop from actual experience a real

---

346. *Id.* at 341.

347. *Id.*

348. *Id.* at 342.

349. *Id.* at 346.

350. *Id.* at 343, 346.

351. *Id.* at 350 (citing text of the Board of Education’s District Policy III.F.4e).

understanding of the democratic way of life.”<sup>352</sup> Consequently, the court ruled that the school district could not dismiss a teacher simply because she and her students sought to remediate problems at their school.<sup>353</sup> The court saw through the purported justifications used to obscure the superintendent’s real motivation for firing Ms. Downs—his desire to squelch all criticism about his failure to ensure a safe and healthy school environment.<sup>354</sup>

*C. The Heightened Hazards of Overly Restrictive Reactions: The Implications of Pearson and Garcetti*

The outcomes in *Lowery* and *Walker-Serrano* were not inevitable under available precedent and should not be treated as the appropriate balancing of student rights and institutional needs. The significance of these flawed rulings extends beyond the litigants and students in the school districts within the relevant judicial circuits.

Although contrary precedent offering protection of similar student expression exists, the Supreme Court’s recently revised qualified immunity jurisprudence increases the likelihood of repressive responses to students’ controversial or critical speech. In *Pearson v. Callahan*,<sup>355</sup> the Supreme Court abandoned the analytical sequence prescribed by *Saucier v. Katz*<sup>356</sup> as the template for the evaluation of officials’ claims of qualified immunity from personal liability in cases alleging violations of constitutional rights.<sup>357</sup> *Saucier*’s protocol required a court to first examine whether the facts alleged or shown by the plaintiff made out a constitutional violation and then, if such a violation was found, to discern if the right had been clearly established when the challenged official conduct occurred.<sup>358</sup> Liability could be imposed only when the right asserted is “clearly established,” a standard that the Court has explained will not be met in the absence of confirming precedents from the controlling jurisdiction at the time of the challenged conduct or “a consensus of cases of persuasive authority such that a reasonable [official] could not have believed that his actions were lawful.”<sup>359</sup> A circuit split on the relevant constitutional question would also rebut the assertion

---

352. *Id.*

353. *Id.* at 348.

354. *See id.* at 346 (identifying the “real cause of friction” as the plaintiff’s criticism of the superintendent).

355. 555 U.S. 223 (2009).

356. 533 U.S. 194 (2001).

357. *Pearson*, 555 U.S. at 236.

358. *Saucier*, 533 U.S. at 201.

359. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

that a right was clearly established.<sup>360</sup> The Court has recognized, however, that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question” even without a prior ruling specifically addressing the practice at issue.<sup>361</sup>

The *Saucier* sequence reflected concern that “were a court simply to skip ahead to the question whether the law was clearly established” the elaboration of constitutional principles could be thwarted.<sup>362</sup> Although noting that the *Saucier* two-step process “promote[d] the development of constitutional precedent,” the unanimous *Pearson* Court yielded to complaints from lower courts about the expenditure of scarce judicial resources on difficult interpretive questions that could have no effect on the actual outcome of a case against officials and concluded that lower courts should have the discretion to dispense with *Saucier*’s first prong.<sup>363</sup> This option, attractive to lower courts straining under heavy caseloads, foreseeably inhibits the correction of officials’ misunderstandings of the nature of constitutional protections.

In *Pearson*’s wake, rulings like *Lowery* and *Walker-Serrano* allow school officials to reasonably project that they will be shielded from personal liability when they react repressively to student petition and protest activity at school.<sup>364</sup> With the liability disincentive removed, school officials may see little downside to firmly and swiftly shutting down student challenges to policies and practices students identify as unfair or dysfunctional.

Acknowledging students as a potentially vital source of information about school efficacy and fairness makes facilitating and protecting student speech a necessary component of school accountability and improvement. Like teachers, students can offer an insider’s perspective on school life. The imperative to create and maintain mechanisms for students to present school-related grievances acquires particular urgency due to the shadow the Supreme Court’s current approach to the protection of public

---

360. *Id.* at 618.

361. *Hope v. Pelzer*, 536 U.S. 730, 740–41 (2002) (citing *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

362. *Saucier*, 533 U.S. at 201.

363. *Id.*

364. See Erwin Chemerinsky, *Civil Rights Cases Will Face New Hurdles*, A.B.A. J. (Feb. 1, 2012, 8:50 AM), [http://www.abajournal.com/news/article/chemerinsky\\_new\\_hurdles\\_for\\_civil\\_rights\\_cases](http://www.abajournal.com/news/article/chemerinsky_new_hurdles_for_civil_rights_cases) (describing how, to overcome a qualified immunity defense, the Supreme Court has begun requiring a case on point that demonstrates that the Plaintiff’s right was clearly established when violated).

employee speech has cast over teachers' willingness to air complaints about school operations.<sup>365</sup>

Under the analysis articulated in *Garcetti v. Ceballos*, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>366</sup> Continuing to retreat from the quality of First Amendment protection once available to public employees speaking on "matters of public concern," such as possible governmental misconduct,<sup>367</sup> Justice Kennedy concluded in *Garcetti* that a Los Angeles County deputy district attorney could not challenge allegedly retaliatory actions taken by his supervisors after a memorandum recommending the dismissal of criminal charges in light of irregularities in the procurement of a key search warrant.<sup>368</sup>

Although some teachers' First Amendment retaliation claims stemming from complaints about problematic school practices or administrator wrongdoing have survived in the post-*Garcetti* era,<sup>369</sup>

---

365. For assessments of the risks that *Garcetti* creates for teachers and other school employees who voice concerns about school practices, see Richard T. Geisel & Brenda R. Kallio, *Employee Speech in K-12 Settings: The Impact of Garcetti on First Amendment Retaliation Claims*, 251 EDUC. L. REP. 19, 20 (2010); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 IN PUB. INTEREST 209 (2008); and Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 U. CINN. L. REV. 1281, 1321-42 (2008). For an examination of *Garcetti*'s impact in the special education context, see Gina K. DePietro & Perry A. Zirkel, *Employee Special Education Advocacy: Retaliation Claims Under the First Amendment, Section 504 and the ADA*, 257 EDUC. L. REP. 823 (2010), noting that teachers and other school employees may be able to obtain relief under provisions of Section 504 of the Rehabilitation Act or the Americans with Disabilities Act (ADA) that confer protection from retaliation on persons attempting to protect the rights of people with disabilities.

366. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

367. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569-70 (1968).

368. *Garcetti*, 547 U.S. at 421. *Garcetti*'s reasoning has been widely criticized. See Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 563 (2008) (describing how *Garcetti* "under-protects public employee speech that is vital to self-government"); Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4, 31 (2009) (arguing that *Garcetti* leaves public employees unprotected when they report safety hazards, ethical lapses, and other government misconduct and should only be used to limit the free speech protections of employees hired to convey specific viewpoints that are clearly recognizable as "governmental in origin"); Paul M. Secunda, *Garcetti's Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMENDMENT L. REV. 117, 117 (2008) (concluding the ruling makes "it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers").

369. See, e.g., *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1206 (10th Cir. 2007) (finding that teachers spoke as citizens addressing matters of public concern when, as part of meetings with parents and other members of the public, they discussed how a charter school's code of employee conduct limited employees' speech and associational rights and whether the school's charter would be renewed);



many others, including claims arising from the identification of potentially serious misconduct or the failure to meet legal obligations to vulnerable students, have been doomed by the application of *Garcetti*.<sup>370</sup> Until *Garcetti* is reconsidered or refined,<sup>371</sup> teachers' efforts to expose school dysfunction will remain a hazardous enterprise few may be bold enough to undertake.<sup>372</sup>

---

Corbett v. Duerring, 780 F. Supp. 2d 486, 489, 493 (S.D. W. Va. 2011) (finding that a vice principal's allegations that he was pressured to apply lenient discipline to children of "persons of influence" was the speech of a citizen on a matter of public concern when he made the remarks during a protest while suspended from office); Sherrod v. Sch. Bd., 703 F. Supp. 2d 1279, 1298 (S.D. Fla. 2010) (finding that a teacher's repeated appearances before the school board to address the district's deficient implementation of statutorily mandated inclusion of African and African-American history in the social studies curriculum could qualify as citizens' speech on a matter of public concern because the teacher testified about district policy matters beyond the scope of his teaching duties and spoke as parent and taxpayer), *rev'd per curiam on other grounds*, 667 F.3d 1359 (11th Cir. 2012).

370. See, e.g., Massaro v. N.Y. City Dep't of Educ., No. 11-2721-CV, 2012 WL 1948772, at \*2 (2d Cir. May 31, 2012) (finding that a teacher's complaints about sanitary conditions and a potential health hazard in a shared classroom arose out of her duties as an employee, precluding First Amendment protection); Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345, 349 (6th Cir. 2010) (holding that a teacher's complaint to supervisors that the size of her teaching caseload prevented her from providing appropriate services to special education students was not protected by the First Amendment because it was made as part of her performance of teaching responsibilities); Weintraub v. Bd. of Educ., 593 F.3d 196, 201 (2d Cir. 2010) (concluding that a fifth grade teacher's filing of union grievance about the principal's failure to discipline a student who threw a book at the teacher in a classroom was unprotected under *Garcetti* because it addressed conditions related to the teacher's essential instructional duties); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007) (*per curiam*) (ruling that a school athletic director's memos seeking information about money missing from an athletic account were not protected under the First Amendment because they addressed matters related to his job duties); Condiff v. Hart Cnty. Sch. Dist., 770 F. Supp. 2d 876, 889 (W.D. Ky. 2011) (reasoning that a teacher's report of an allegation that another teacher sexually harassed her step-daughter was not entitled to First Amendment protection because the teacher, as part of her job duties, was obligated under the school sexual harassment policy to relay any such allegations to the school administration); Morey v. Somers Cent. Sch. Dist., No. 06 Civ. 1877(PGG), 2010 WL 1047622, at \*8 (S.D.N.Y. Mar. 19, 2010) (deciding that a head custodian's complaints to the district administrators about possible asbestos contamination in a high school gym were unprotected because they were made in furtherance of his core employment responsibilities), *aff'd*, 410 F. App'x 398 (2d Cir. 2011).

371. See Lyle Denniston, *Free Speech Issue Bypassed*, SCOTUSBLOG (Feb. 27, 2012, 12:23 p.m.), <http://www.scotusblog.com/2012/02/free-speech-issue-bypassed/> (noting that by denying certiorari petitions seeking review of *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1634 (2012), and *Bowie v. Maddox*, 642 F.3d 1122 (D.C. Cir. 2011), *reh'g denied*, 653 F.3d 45 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1636 (2012), the Court evaded opportunities to reconsider the reach of *Garcetti*).

372. Teachers in some areas may be able to invoke the protection of state whistleblower laws when they seek to expose problems in schools. See Brenda R. Kallio & Richard T. Geisel, *To Speak or not to Speak: Applying Garcetti and Whistleblower Laws to Public School Employee Speech*, 264 EDUC. L. REP. 517, 531-32 (2011) (describing variable scope of such state laws and identifying procedural prerequisites, such as the presentation of the issue to a supervisor, that may inhibit teachers' use of this mode of protection).

## IV. MAKING ROOM FOR STUDENT DISSENT AT SCHOOL

When school officials and reviewing courts regard student speech seeking change at school as a threat to the accomplishment of the instructional mission, they ignore both the educational opportunity offered by this kind of student dissent and its constitutional value. To counteract this repressive reflex, this Article presents two recommendations. First, schools must be persuaded to reframe their understanding of their instructional mission. To educate children for citizenship, the essential objective of a civics curriculum, schools should ensure that their instructional program includes a participatory dimension. Second, courts should reinforce schools' adherence to a properly articulated civic education agenda by applying more rigorous scrutiny to schools' attempts to suppress or punish student dissent seeking change in school policies or practices.

A. *New Norms for Educators: Adopting a Capabilities Approach, Assuming a Fiduciary Role*

Given the consistent emphasis on the added value of including a participatory component in schools' civic education program, the analysis of student dissenters' invocation of First Amendment protection might be constructively reshaped by drawing on Martha Nussbaum's capabilities-oriented approach to the interpretation of constitutional rights.<sup>373</sup> Anchored in a commitment to respecting the dignity of each person, the Capabilities Approach presses an exploration of what people are "able to do and to be" and the attendant investigation of what social and political obligations should properly be enforced in order to offer each person sufficient opportunity to achieve her human potential.<sup>374</sup> A Capabilities Approach invites careful attention to how constitutional principles and their interpretation have promoted or impeded people's abilities to function in some central areas of human life, asking, "[d]oes the interpretation of constitutional entitlements yield real abilities to choose and act, or are the constitution's promises more like hollow verbal gestures?"<sup>375</sup> In Nussbaum's account, the normative essence of the Capabilities Approach, although recently ignored by Roberts

---

373. Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 56–95 (2007) [hereinafter Nussbaum, *Constitutions and Capabilities*]. For a sustained exploration of the content of a Capabilities Approach and its implications in the formation of public policy, see generally MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011).

374. Nussbaum, *Constitutions and Capabilities*, *supra* note 373, at 5–6.

375. *Id.* at 6.

Court majorities, has animated judicial reasoning and advanced constitutional understanding in some of the Supreme Court's most significant and controversial rulings.<sup>376</sup> Evaluating the respective constitutional prerogatives of the student critic and school officials through the lens of a Capabilities Approach could clarify what is at stake when student dissent is stifled.

In recent work with Rosalind Dixon, Professor Nussbaum has identified how adopting a capabilities-oriented analytical approach could improve the understanding of children's rights claims.<sup>377</sup> Dixon and Nussbaum clarify how recognizing specific rights for children might be justified so as to demonstrate appropriate sensitivity to children's needs and vulnerabilities as well as their often overlooked capacity for agency.<sup>378</sup> Dixon and Nussbaum draw on Jonathan Wolff and Avner de-Shalit's explanation of the concept of corrosive disadvantage to explain why children's rights claims should be afforded special priority.<sup>379</sup> Wolff and de-Shalit identify what they label as corrosive forms of disadvantage which both inflict present damage and precipitate other capability failures in the future.<sup>380</sup> Dixon and Nussbaum focus on how certain forms of material deprivation, such as malnutrition, could subject children to corrosive disadvantage by undermining their physical health and mental development—outcomes inconsistent with respect for the dignity of children as persons.<sup>381</sup> Dixon and Nussbaum then project the future hazards this kind of children's disadvantage could create for the larger society in which they live when, for example malnourished children's impaired cognitive development threatens to diminish their future employability and their ability to perform their civic responsibilities, such as voting.<sup>382</sup>

Denying children participatory and expressive opportunities in school could create problematic citizenship skills deficits for children. Such deficits threaten children both in their present and

---

376. *Id.* at 56–73 (explaining how the Courts' rulings in cases such as *Plyler v. Doe*, 457 U.S. 202 (1982), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Brown v. Board of Education*, 347 U.S. 483 (1954), reveal the implicit adoption of a Capabilities Approach).

377. Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 553 (2012).

378. *Id.* at 553.

379. *Id.* at 580.

380. JONATHAN WOLFF & AVNER DE-SHALIT, *DISADVANTAGE* 121 (2007). Wolff and de-Shalit contrast "corrosive disadvantages" with "fertile functionings," abilities that, once acquired or developed, establish a foundation for the acquisition of other desirable skills or attributes. *Id.* at 138.

381. Dixon & Nussbaum, *supra* note 377, at 580–81.

382. *Id.* at 582–83.

future lives, thwarting their acquisition of a civic voice and depleting their motivation to participate in collective problem-solving.<sup>383</sup> For children living in historically disenfranchised and neglected communities, opportunities to express concerns and to affect change at school may be particularly critical. Such opportunities offer a glimpse of a responsive civic world and sustain students' faith in the possibility of democratic governance<sup>384</sup> and in their own capacity to act as agents of reform.<sup>385</sup>

Moreover, short-circuiting students' efforts to challenge perceived inequity or dysfunction at school could inhibit rather than enhance institutional functioning in at least two ways. First, if school officials exhibit a reflexively repressive response when students question them, these officials fail to conform to constitutional democracy's expectation that authority can be subject to challenge and that those wielding authority should answer such challenges by presenting reasoned justifications rather than insisting on automatic deference.<sup>386</sup> This potentially alienates students from their school and undermines their faith in public institutions.<sup>387</sup> Second, simply shutting down student dissent by equating such speech with unacceptable disruption also cuts off access to the information resource students represent.<sup>388</sup> Students are an underutilized source of "critical local knowledge,"<sup>389</sup> and their aired concerns and grievances offer data about both a school's climate and practices.

---

383. MEIRA LEVINSON, *NO CITIZEN LEFT BEHIND* 192, 197–98 (2012) [hereinafter LEVINSON, *NO CITIZEN*].

384. *Id.* at 195.

385. *Id.* at 226 (noting the power of such experiences in counteracting too frequently propagated images of low income students of color as "bundles of deficits who traumatize the community via academic failure, idleness, and even criminal delinquency;" such images distort both the broader society's view of such youth and, perhaps even more tragically, such youths' view of themselves).

386. See Constance A. Flanagan et al., *School and Community Climates and Civic Commitments: Patterns for Ethnic Minority and Majority Students*, 99 J. EDUC. PSYCHOL. 421, 422, 428–29 (2007) (arguing that "young people's confidence in the system occurs via the accumulated experience of fair (due) process and responsive interactions with adult authorities," and subsequently, "[t]he kinds of public spaces our schools and communities provide and the behaviors of adults in those settings communicate to the younger generation what it means to be part of the body politic and to what extent principles of inclusion, fairness and justice figure in that process").

387. See William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 220 (2001) (describing young people's lack of confidence in "public institutions whose operations they regard as remote, opaque, and virtually impossible to control").

388. See *supra* Part II (discussing how free exchange among students can benefit school officials and other students).

389. LEVINSON, *NO CITIZEN*, *supra* note 383, at 227 (citation omitted) (internal quotation marks omitted).

Invigorating the protection of student dissent at school would also be a part of an overdue effort to integrate children into operative regimes of political accountability. As Ethan Leib and David Ponet have explained, democracies' failure to grapple with children's status as the "orphans of political theory" undermines governmental credibility and legitimacy.<sup>390</sup> Although repeatedly affirming their commitment to principles of inclusion and representation, constitutional democracies such as the United States persistently evade the challenge of translating those principles into practice for children.

Leib and Ponet propose that fiduciary principles could yield new insights into the practical demands of such governmental commitments.<sup>391</sup> Charged to act in the beneficiaries' best interest, a fiduciary must "actively seek to understand what the beneficiary herself prioritizes" and adhere to a "dialogic imperative."<sup>392</sup> Although able to draw on relevant experience and expertise in making decisions affecting the beneficiary, the fiduciary must exhibit respect for beneficiary interests and preferences, and such respect will be best manifested in "a true willingness to listen and be responsive" to the beneficiary's views.<sup>393</sup> Stepping beyond "perfunctory consultation," the fiduciary should actually talk with the beneficiary, maintaining an attitude of sincere openness to what can be learned from what the beneficiary says.<sup>394</sup> The fiduciary must "actively work[] to discover, investigate, and engage" the beneficiary's preferences.<sup>395</sup> This process may not ultimately require conforming to the beneficiary's preferred course, but it nonetheless establishes a foundation of earned trust.<sup>396</sup> Leib and Ponet describe this duty as one of "deliberative engagement" and use it as the guidepost for political reform to realize children's citizenship.<sup>397</sup> They specifically recommend that governments create mechanisms to facilitate this kind of authentic exchange with children and identify the use of institutional ombudsmen as one such viable mechanism.<sup>398</sup>

---

390. Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. POL. PHIL. 178, 178 (2012).

391. *Id.* at 179.

392. *Id.* at 180 (using "dialogic imperative" to mean a public servant's duty to enter into dialogue with child-beneficiaries in order to discern their views and preferences).

393. *Id.* at 180, 189–90.

394. *Id.*

395. *Id.* at 180.

396. *Id.* at 185–86.

397. *Id.* at 190.

398. *Id.* at 192–98.

In this role the ombudsman would have “affirmative duties to talk to children and create deliberative fora to engage them.”<sup>399</sup>

Applying Leib and Ponet’s conceptual model to the public school context reveals the immanent fiduciary character of the roles of teachers and administrators with regard to their students’ developing constitutional capacities, including their capacity to dissent as they identify injustice and call for the correction of governmental dysfunction. In order for students to exercise and cultivate their capabilities as dissenters, schools should create and preserve channels for student expression, including student petition and protest, and courts should protect such expression through the application of appropriately tailored legal standards.

Adopting a more dissent-receptive approach would reflect an aspiration to create what Philip Cook has described as “the just school.”<sup>400</sup> Cook finds flaws in what he describes as a liberal view of how schools should treat children, a view that focuses on the child as future adult, as well as in what he describes as the liberationist view of children, which can mistakenly regard the child as being the same as an adult.<sup>401</sup> Cook argues that what is owed children as a matter of justice cannot be properly assessed by treating the experience of childhood only in terms of its instrumental value to the children’s future adulthood.<sup>402</sup> The significance of schools’ effects on children’s present lives should not be overlooked, and an appreciation of childhood as “a stage of development that includes a political dimension” requires careful scrutiny of how schools treat children.<sup>403</sup>

While in school, children engage in what should be recognizable as political relations with other children and with adults at school—adults who, in public schools, act on behalf of the state. As they interact with their peers and supervising adults, children are undertaking political practices and exploring what relevant values, such as fairness and accountability, demand at school. The encounters and exchanges with others at school constitute what Cook terms a “dynamic relationship;” children are guided and influenced by the adults around them, and children potentially influence the

---

399. *Id.* at 194; see also Barbara Bennett Woodhouse, *Enhancing Children’s Participation in Policy Formation*, 45 ARIZ. L. REV. 751, 754–59 (2003) (describing strategies for involving children and youth in the development and implementation of government policies affecting them).

400. Philip Cook, *The Just School* 1, 3, 29–44 (Econ. & Soc. Research Council, Working Paper, Grant Ref. RES-000-22-3228), available at <http://www.esrc.ac.uk/my-esrc/grants/RES-000-22-3228/outputs/read/686f6ea8-1b7b-4a64-9b0e-df7cca6a3c7e>.

401. *Id.* at 10.

402. *Id.* at 6.

403. *Id.* at 11.

adults and other children in the school, contributing to “their own progressive moral development” and to the improvement of the shared community.<sup>404</sup> These interactive exchanges should, Cook counsels, be conducted with sensitivity to children’s emergent capabilities, including their capacity for moral agency, and children’s simultaneous vulnerabilities as they progress toward maturity.<sup>405</sup> The reality of these vulnerabilities for children generally at certain stages of development and for specific children due to their individual circumstances creates the need for adult supervision, guidance, and, at times, discipline and the imposition of limitations.<sup>406</sup> However, appropriate responses to children should be grounded in knowledge about the children involved and in respect for children as persons. Cook calls for recognition of the school as a “child-specific political institution,”<sup>407</sup> and argues that the school should be obligated to “serve the political interests of children *qua* children by providing the freedoms, resources, and opportunities for children to engage in political relations with other children and adults, free from threats of harm to those political relations.”<sup>408</sup> Denying the child opportunities to air grievances and concerns and to have the experience of receiving a respectful and reasoned response at school would be an example of such a threat.

*B. Reframing Schools’ Instructional Agenda to Protect the Student Critic:  
Civic Education’s Participatory Imperative*

Amidst increasing concern about youth disengagement from politics and demonstrated deficiencies in public school students’ knowledge about the rudiments of our constitutional system,<sup>409</sup> renewed attention has recently been directed at constructing an effective civic education agenda for America’s public schools.<sup>410</sup> In

---

404. *Id.*

405. *Id.* at 11–12.

406. *Id.* at 15. Constraints can therefore be properly imposed on children when they lack required competencies or when they want to pursue activities associated with documented long-term harms to themselves or others, harms that the children cannot reliably weigh or mitigate.

407. *Id.* at 32.

408. *Id.* at 44.

409. See, e.g., THE NAT’L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCI., CIVICS 2010: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4, 8, AND 12, at 8 (2011), available at <http://nces.ed.gov/nationsreportcard/pdf/main2010/2011466.pdf> (reporting that only 27% of fourth grade students performed at or above the Proficient level in 2010 testing and only two percent earned Advanced scores).

410. See generally CAMPAIGN FOR THE CIVIC MISSION OF SCHS., GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS (2011), available at <http://civicmission.s3.amazonaws.com/118/f0/5/171/1/Guardian-of-Democracy-report.pdf> (last visited Dec. 17, 2012) [hereinafter GUARDIAN OF DEMOCRACY REPORT] (providing policy

their influential report, *The Civic Mission of Schools*, the Carnegie Corporation, and the Center for Information and Research on Civic Learning and Engagement (CIRCLE) stress the unique and critical role public schools play in preparing youth to perform the duties of citizenship but bemoan the dramatic narrowing of civic education offerings.<sup>411</sup> Schools increasingly offer only a course that addresses government in abstract terms “with little explicit discussion of a citizen’s role.”<sup>412</sup>

Citing the cultivation of civic skills and attitudes as a primary impetus for the creation of our public school system,<sup>413</sup> the Carnegie/CIRCLE report underscores that among all public institutions, “schools are the most systematically and directly responsible for imparting citizen norms.”<sup>414</sup> Schools shape students’ attitudes, beliefs, and habits as citizens most powerfully through their daily practices. The “models of civic community” students encounter at school trigger foreseeable responses: “[Students] learn when to stay quiet and how to fly under the radar, and they learn when—and with whom—they can speak up.”<sup>415</sup> Inspired by John Dewey’s educational ethos,<sup>416</sup> schools can serve as civic laboratories where students test out their own understandings of citizenship while

---

recommendations and best practices in civic learning). The report was prepared by the Campaign for the Civic Mission of Schools in partnership with the Leonore Annenberg Institute for Civics of the Annenberg Public Policy Center at the University of Pennsylvania, the National Conference on Citizenship, the Center for Information and Research on Civic Learning and Engagement at Tufts University, and the American Bar Association Division for Public Education.

411. CARNEGIE CORP. OF N.Y. & CIRCLE: CTR. FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, *THE CIVIC MISSION OF SCHOOLS 12–16* (2003), available at <http://www.civicyouth.org/PopUps/CivicMissionofSchools.pdf> [hereinafter CARNEGIE/CIRCLE REPORT].

412. *Id.* at 14.

413. *Id.* at 11. The CARNEGIE/CIRCLE REPORT notes that many state constitutions explicitly link the provision of public education with preparation for the responsibilities of citizenship. *See, e.g.*, CAL. CONST. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement”); IND. CONST. art. VIII, § 1 (“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools . . . .”); MINN. CONST. art. VIII, § 2 (“The stability of a republican form of government depending upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools.”).

414. CARNEGIE/CIRCLE REPORT, *supra* note 411, at 12.

415. LEVINSON, *NO CITIZEN*, *supra* note 383, at 175.

416. John Dewey conceptualized the public school as “a miniature community, an embryonic society.” JOHN DEWEY, *THE SCHOOL AND SOCIETY & THE CHILD AND THE CURRICULUM* 18 (1990).



assessing how the adults at school translate the meaning of citizenship and governance.

The Carnegie/CIRCLE Report then projects a capacity-building and practice-oriented agenda for civic education that will enable students “to be competent and responsible citizens throughout their lives.”<sup>417</sup> To set the agenda for a revitalized program of civic education, the report offers this inventory of relevant attributes and capacities for “[c]ompetent and responsible citizens”:

[They] are informed and thoughtful. They have a grasp and an appreciation of history and the fundamental processes of American democracy; an understanding and awareness of public and community issues; an ability to obtain information when needed; a capacity to think critically; and a willingness to enter into dialogue with others about different points of view and to understand diverse perspectives. They are tolerant of ambiguity and resist simplistic answers to complex questions.

[They] participate in their communities. They belong to and contribute to groups in civil society that offer venues for Americans to participate in public service, work together to overcome problems, and pursue an array of cultural, social, political, and religious interests and beliefs.

[They] act politically. They have the skills, knowledge, and commitment needed to accomplish public purposes—for instance, by organizing people to address social issues, solving problems in groups, speaking in public, petitioning and protesting to influence public policy, and voting.

[They] have moral and civic virtues. They are concerned for the rights and welfare of others, are socially responsible, willing to listen to alternative perspectives, confident in their capacity to make a difference, and ready to contribute personally to civic and political action. They strike a reasonable balance between their own interests and the common good. They recognize the importance of and practice civic duties such as voting and respecting the rule of law.<sup>418</sup>

The work of civic education advocates and the research of scholars who have examined the components of civic education initiatives consistently confirm that an effective instructional program should include a participatory dimension.<sup>419</sup> A passive, inculcative approach to citizenship education that offers students only abstract civics

---

417. CARNEGIE/CIRCLE REPORT, *supra* note 411, at 10.

418. *Id.*

419. *See id.* at 16 (identifying the creation of opportunities for students to participate in school governance as among the most promising approaches to civic education).

lessons or a purely observational perspective on citizens' critical engagement with government will likely be less effective in fostering students' "will and skill" to play an active role in civic life.<sup>420</sup> Moreover, an educational environment that gives adolescents an experience of efficacy when they participate in school life has been identified as a significant predictor of whether U.S. students report that they expect to vote as an adult.<sup>421</sup> This kind of school experience may be particularly important for students from economically and socially disadvantaged communities and from constituencies with a history of political disempowerment.<sup>422</sup>

Establishing more avenues for students to participate in school governance and institutional improvement would track the trajectory of international human rights law's effort to redefine the nature of governmental obligations to children and the content of children's citizenship. Moving beyond initial efforts to establish governmental duties to provide for and to protect children,<sup>423</sup> Article 12 of the United Nations Convention on the Rights of the Child explicitly endorses affording children opportunities to participate in governance.<sup>424</sup> Although the United States has not ratified the

---

420. See James Youniss et al., *What We Know About Engendering Civic Identity*, 40 AM. BEHAV. SCIENTISTS 620, 620 (1997) (confirming that students whose education has included a participatory component, such as involvement in student government or service learning activities, are more likely to exhibit a civic identity characterized by "individual and collective senses of social agency, responsibility for society, and political-moral awareness"). See generally JAMES YOUNISS & MIRANDA YATES, *COMMUNITY SERVICE AND SOCIAL RESPONSIBILITY IN YOUTH: THEORY AND POLICY* (1997) (exploring the nexus between community service and construction of adolescent self-identity); Miranda Yates & James Youniss, *Community Service and Political-Moral Identity in Adolescents*, 6 J. RES. ON ADOLESCENCE 271 (1996) (employing empirical analysis to prove how community service affects students' development of civic identity).

421. Judith Torney-Purta & Jo-Ann Amadeo, *A Cross-National Analysis of Political and Civic Involvement Among Adolescents*, 36 POL. SCI. & POL. 269, 271 (2003).

422. See PETER LEVINE, *THE FUTURE OF DEMOCRACY: DEVELOPING THE NEXT GENERATION OF AMERICAN CITIZENS* 131 (2007) (noting the positive impact of increased civic knowledge among students in schools with poor educational outcomes); LEVINSON, *NO CITIZEN*, *supra* note 383, at 175 (emphasizing that students inevitably model and practice the norms exhibited by their schools, whether positive or negative).

423. See Mary John, *Voicing: Research and Practice with the 'Silenced,'* in CHILDREN IN CHARGE: THE CHILD'S RIGHT TO A FAIR HEARING 3, 3-6 (Mary John ed., 1996) (describing how recognition of children's participatory rights during revision of the U.N. Convention on the Rights of the Child reflected an evolving understanding of children as citizens rather than as only dependent members of a society).

424. Article 12 reads as follows: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." U.N. Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3.

Convention,<sup>425</sup> its provisions offer a valuable affirmation of the necessity of adding a participatory dimension to our understanding of children's constitutional rights.<sup>426</sup>

To demonstrate a commitment to offering students opportunities to practice the skills of citizenship, schools must welcome student perspectives on problems facing the school community. Adopting such a receptive stance may not inevitably result in the adoption of students' preferences or recommendations as school policy, but it will greatly enhance the legitimacy of official decision-making. Such receptivity encompasses making a place for student petition and protest within a participatory civic education model, a proposition endorsed by retired Supreme Court Justice Sandra Day O'Connor, who has been at the forefront of the campaign for the revitalization of public schools' efforts to prepare students for the responsibilities of citizenship.<sup>427</sup>

In a 2009 speech to a joint session of the Florida legislature, shortly after Florida had enacted legislation mandating that civics education begin in middle school, Justice O'Connor emphasized public schools' vital role in preparing youth for citizenship:

Self-government, which we have enjoyed in this country, cannot survive unless people—our citizens—are willing to get engaged and understand the commitments necessary to make democracy work. It was for that very reason that public schools were created in this country in the first place: to produce citizens who have the knowledge and the skills and the values to sustain our form of government, our democracy.<sup>428</sup>

---

425. See David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood*, 17 EMORY INT'L L. REV. 967, 983 (2003) (describing proffered explanations for U.S. reticence to ratify the Convention). Of the UN member states, only the United States and Somalia have not ratified the Convention. *Id.* at 973 n.11.

426. See generally Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 2 (1999) (describing the constructive influence of the U.N. Convention on the Rights of the Child on constitutional development across the globe but acknowledging doctrinal and political barriers to incorporating understanding of children's rights expressed in the Convention into American constitutional law).

427. See Alexander Heffner, *Former Supreme Court Justice Sandra Day O'Connor on the Importance of Civics Education*, WASH. POST (Apr. 12, 2012), [http://www.washingtonpost.com/lifestyle/magazine/former-supreme-court-justice-sandra-day-oconnor-on-the-importance-of-civics-education/2012/04/10/gIQA8aUnCT\\_story.html](http://www.washingtonpost.com/lifestyle/magazine/former-supreme-court-justice-sandra-day-oconnor-on-the-importance-of-civics-education/2012/04/10/gIQA8aUnCT_story.html) (reporting Justice O'Connor's launch of iCivics, a Web-based education project); Seth Schiesel, *Former Justice Promotes Web-Based Civics Lessons*, N.Y. TIMES, June 9, 2008, at E7 (describing Justice O'Connor's work with Georgetown University Law Center and Arizona State University, to develop the Our Courts website ([www.ourcourts.org](http://www.ourcourts.org)) with interactive civics curriculum for middle school students).

428. Sandra Day O'Connor, *Sandra Day O'Connor on Civics Education*, J. JAMES MADISON INST., Spring/Summer 2009, at 14–15.

She then described civics education as an opportunity to teach students how to improve their own communities, adding “it’s about teaching students that one person can ignite political fires on the ground, and those fires almost always begin with a very small spark.”<sup>429</sup> Significantly, Justice O’Connor specifically praised the efforts of Florida schoolchildren who, after learning about the *Tinker* ruling through a civic education program, took aim at a problem within their own school, staging a silent protest in the school cafeteria in order to confront school officials about the poor quality of school lunches.<sup>430</sup> Justice O’Connor applauded the students’ initiative as the “kind of engagement and proactive spirit [that] is exactly what civics education is all about.”<sup>431</sup>

As Justice O’Connor’s praise for the Florida schoolchildren’s protest initiative suggests, the most effective education in constitutional citizenship will go beyond the more traditional transmission of relevant historical and political knowledge and have an active, perhaps even confrontational, participatory component. As the Carnegie/CIRCLE report prescribed, to offer effective preparation to citizenship schools should “structure the school environment and climate so that students are able to ‘live what they learn’ about civic engagement and democracy.”<sup>432</sup> To do this, schools should create outlets for students to speak out about school conditions and practices and offer students opportunities to see how school policies are made.<sup>433</sup>

School officials may be less than enthusiastic about recommendations urging “meaningful student participation in school governance,”<sup>434</sup> foreseeing the creation of channels for students to air concerns and complaints about how the school operates. Such apprehensions may explain why descriptions of possible modes of participation have gravitated toward familiar and often limited forms of student involvement, such as student council activities. This reticence to offer students opportunities to address problems arising in their classrooms, in their school, or in their school district regrettably ignores research linking such opportunities and the sense of personal efficacy they engender with students’

---

429. *Id.*

430. *Id.* at 16.

431. *Id.*

432. CARNEGIE/CIRCLE REPORT, *supra* note 411, at 21.

433. *Id.*

434. See GUARDIAN OF DEMOCRACY REPORT, *supra* note 410, at 33, 43 (identifying student participation in school governance as a proven practice that enhances the effectiveness of civic education programs).

positive forecasts of their future civic involvement.<sup>435</sup> Moreover, when school officials resist creating outlets for students to air grievances and concerns, they ignore the valuable informational resource students' observations about school functioning can provide<sup>436</sup> and they slight students' genuine desire to contribute to school improvement efforts.<sup>437</sup>

Somewhat perplexingly, those calling for a reinvigorated program of civic education that includes participatory opportunities have not yet addressed a potentially controversial and challenging question: How schools' responses to student petition and protest that take aim at school policies and practices could enhance or potentially detract from the effective transmission of the practical demands of constitutional commitments. This Article responds to that omission and examines the elements of the constitutional analysis courts should use to review schools' restriction or punishment of this kind of student dissent.

### C. *Revising the Applicable Legal Standard*

Courts' deferential review of school officials' decisions to restrict or even punish student expression has led some scholars to draw an alarming parallel between the limited protection of student speech in

---

435. CARNEGIE/CIRCLE REPORT, *supra* note 411, at 27; *see also* Constance A. Flanagan & Nakesha Faison, *Youth Civic Development: Implications of Research for Social Policy and Programs*, 15 SOC. POL'Y REP., no. 1, 2008, at 3–5 (explaining that students' civic identities are rooted in their opportunities for civic involvement).

436. *See* Sam Dillon, *What Works in the Classroom? Ask the Students*, N.Y. TIMES, Dec. 11, 2010, at A15 (presenting findings of a Gates Foundation study showing that surveying students on teachers' ability to keep order, maintain student interest, and help students learn from mistakes provided assessments of teacher effectiveness that closely tracked data from standardized test results); *see also* LEVINSON, NO CITIZEN, *supra* note 383, at 224–30 (describing “action civics” initiatives undertaken by programs such as the Mikva Challenge, the Hyde Square Task Force, and the Philadelphia Student Union in which high school students identified a community issue, conducted research, developed advocacy strategies, and prompted significant changes in policy); Elizabeth Armstrong, *Project 540: Students Seeking More than a Revolution*, CHRISTIAN SCI. MONITOR, Jan. 28, 2003, at 12 (describing civics education initiatives at 250 U.S. high schools in which students generate action plans for school and community improvement).

437. *See, e.g.*, Celina Su, “Where Youth Have an Actual Voice”: Teenagers as Empowered Stakeholders in School Reform, in GASTON ALONSO ET AL., OUR SCHOOLS SUCK: STUDENTS TALK BACK TO A SEGREGATED NATION ON THE FAILURES OF URBAN EDUCATION 143, 143–75 (2009) (describing effective student mobilizations to secure changes in school policies regarding the subsidies for low-income students' public transportation costs, the provision of guidance counselors, and the use of force by school-based police); ADVANCEMENT PROJECT ET AL., VIRGINIA STUDENTS SPEAK OUT (2007), *available at* <http://www.virginia-organizing.org/sites/default/files/Obstacles2Opportunity-Final.pdf> (last visited Dec. 17, 2012) (presenting results from student group's survey of district's high school population regarding “opportunity gaps” inhibiting academic success of low income students, students with disabilities, students of color, and ESL learners).

schools and the sharply curtailed speech prerogatives of prisoners and members of the military.<sup>438</sup> Although this Article has argued that such deference is not inevitably prescribed by relevant Supreme Court precedent, a new articulation of the legal standard courts should apply when analyzing schools' authority to curtail student petition and protest could greatly enhance the effective protection of student dissent.

If the expression of dissent and the presentation of grievances are core prerogatives of constitutional citizenship, courts reviewing students' claims for First Amendment protection of petition or protest activity at school must seriously consider the implications of limiting students' exercise of such prerogatives in an environment putatively charged with providing citizenship education. To deflect such claims, school officials should have to identify legitimate differentiating characteristics of the student speakers or conditions in the distinct institutional context—the school—to justify speech limitations. Such justifications have, however, frequently been broadly framed, taking the form of the categorical assertion, as in *Walker-Serrano*, that students as a group lack the maturity, judgment, or intellectual capacity either to levy valid criticisms or complaints about school operations or to present such claims in a manner that does not needlessly harm others.<sup>439</sup> Another generalized defense has been the claim, accepted in *Lowery*, that countenancing such student speech would, as a general predictive matter, be more likely to undermine respect for school officials' authority than to have a constructive impact on school functioning.<sup>440</sup>

If reviewing courts identified an obligation to scrutinize the restriction or punishment of student dissent so as to discourage a reflexively repressive response by school officials, such officials would expect to have to present carefully articulated, situation-specific explanations of why limitations of student dissent, petition, and protest could not be reconciled with daily school activities. In addition, school officials would be required to demonstrate that

---

438. See, e.g., Aaron H. Caplan, *Freedom of Speech in School and Prison*, 85 WASH. L. REV. 71 (2010) (examining problematic implications of judges' use of comparisons between operational needs of prisons and schools to justify restrictions on student speech); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999) (noting disturbing parallels in increasing judicial receptivity to administrators' claimed need for sweeping authority to restrict basic rights in prisons and schools).

439. See *supra* Part III.B.3 (discussing *Walker-Serrano II*, 325 F.3d 412 (3d Cir. 2003)).

440. See *supra* Part III.B.1 (discussing *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007)).

alternative mechanisms were available for students to communicate their concerns to school authorities and, potentially, to the public.

Ensuring that schools maintain appropriately dissent-receptive environments requires re-examining the quality of judicial scrutiny applied when school officials silence or punish student critics. This Section urges courts to acknowledge the heightened vulnerability of the student speaker who offers a critical perspective on school functioning and to exhibit sensitivity to how schools' and courts' responses to student dissent can shape or deform students' understanding of First Amendment commitments.

After examining how schools have restricted student speech addressing highly charged topics or introducing controversial perspectives, John Taylor has concluded that *Tinker's* current formula fails to offer student speakers adequate protection against purposeful viewpoint discrimination.<sup>441</sup> The possibility that school officials' adverse reactions to student speech may be predicated on viewpoint hostility rather than valid institutional concerns will likely be considerably greater when students air their complaints about school operations, effectively targeting either the officials with the power to restrict or punish the student critics or members of a larger bureaucracy from whom such officials may fear retribution if they fail to squelch student criticism.

To formulate his recommendations for modifications to the *Tinker* standard to more reliably inhibit educators' viewpoint discriminatory restrictions of student speech,<sup>442</sup> Taylor productively mines Elena Kagan's insight that First Amendment doctrine may be most coherently understood as the Court's effort to uncover improper government motives for speech restrictions.<sup>443</sup> Kagan describes the doctrinal approaches created and used by the Court as "tools to flush out illicit motives and to invalidate actions infected with them."<sup>444</sup> Kagan persuasively traces the possible genesis of this "motive-hunting" project<sup>445</sup> to the Court's apprehension "that the government will err, as a result of self-interest or bias" when it acts to curtail speech.<sup>446</sup> First Amendment rules advancing these concerns

---

441. John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 577, 591–95 (2009).

442. Taylor recommends altering the *Tinker* inquiry to require school officials to show that challenged speech restrictions are narrowly tailored to remedy or prevent a substantial disruption of the school environment. *See id.* at 608–23.

443. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

444. *Id.*

445. *Id.*

446. *Id.* at 512.

serve as “double proxies,” working to unearth unacceptable motives and then to illuminate problematic effects on public discourse and community governance.<sup>447</sup> Kagan regards this analytical method as a plausible rendition of the demands of a crucial strand within American political theory:

The democratic project is one of constant collective self-determination; expressive activity is the vehicle through which a sovereign citizenry engages in this process by mediating diverse views on the appropriate nature of the community. Were the government to limit speech based on its sense of which ideas have merit, it would expropriate an authority not intended for it and negate a critical aspect of self-government. Democracy demands that sovereign citizens, through each generation, retain authority to evaluate competing visions and their adherents—to decide which ideas and officials merit approval. Hence democracy bars the government from restricting speech (as it also bars the government from limiting the franchise) on the ground that such activity will challenge reigning beliefs or incumbent officials. The government must treat all ideas as contingent, because subject to never-ending popular scrutiny. On this view, the prohibition of certain motives again serves as a way to delineate the proper sphere of authority, hereby preventing a democratic state from contravening key principles of self-government and thereby undermining its foundation.<sup>448</sup>

The failure to adopt an analytical framework with the sensitivity to detect possible improper motives by government decision-makers, motives that could thwart rather than facilitate the achievement of operational objectives, has been a serious deficiency in what has been described as “the emerging First Amendment law of managerial prerogative,”<sup>449</sup> an approach manifested in recent decisions such as *Garcetti v. Ceballos* but also identifiable in the Supreme Court’s student speech cases.<sup>450</sup> Lawrence Rosenthal has argued that the First Amendment can tolerate the imposition of some restraints on speech in governmental enterprises because such limitations “ensure[] that

---

447. *Id.* at 509–10.

448. *Id.* at 513–14.

449. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 86–93 (2008). Rosenthal’s effort to explain and defend some governmental authority to limit speech draws on Robert Post’s work illuminating how the Supreme Court’s introduction of a distinction between government acting as sovereign or regulator and government acting as manager had reshaped First Amendment doctrine. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 234–67 (1995) (arguing that the differences between governance and management theories track closely with distinctions created between treatment of speech in public and nonpublic forums, respectively).

450. Rosenthal, *supra* note 449, at 93–95.



political officials have effective control over the functioning of public offices—and therefore are fairly held politically accountable for the operations of those offices.”<sup>451</sup> However, Rosenthal qualifies his endorsement of the managerial prerogative justification for speech restrictions, noting that its use to pursue some governmental objectives would not be regarded as legitimate.<sup>452</sup> As examples of improper objectives pursued through managerial control over speech, Rosenthal identifies the enforcement of ideological conformity through loyalty oaths<sup>453</sup> or patronage regimes<sup>454</sup> as well as the punishment of employees speaking as citizens, not as employees, on a matter of public concern.<sup>455</sup> This attempt to differentiate proper from improper bases for a claimed managerial need to control speech corroborates the Kagan intuition that the motive for the government’s restriction often plays a submerged but critical role in the assessment of its authority to regulate speech. If, for example, the government acts on the basis of a motive detached from appropriate concerns such as the promotion of program efficacy, the foundation for its assertion of a need for managerial control of speech dissolves.

As recent work by scholars at the Cultural Cognition Project (CCP) demonstrates, the extent to which observers interpret the actions of protesters or dissenting speakers as posing a threat to public order varies significantly depending on whether those observers regard the protesters as sharing or challenging their cultural outlooks.<sup>456</sup> These experimental results reveal the power of cultural cognition, a kind of “motivated reasoning that promotes congruence between a person’s defining group commitments, on the one hand, and his or her perceptions of risk and related facts, on the other.”<sup>457</sup> The CCP

---

451. *Id.* at 34.

452. *Id.* at 39.

453. *Id.* at 65–66.

454. *Id.* at 66.

455. *Id.* (referencing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)).

456. See Dan M. Kahan et al., “*They Saw A Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012). In the study, 202 participants were asked to view silent video footage of demonstrators outside of what they were told was either an abortion clinic or a military recruitment center, prompting the participants to ascribe to the protesters (whose signs were obscured) either an anti-abortion stance or a message opposing “Don’t Ask, Don’t Tell.” *Id.* at 869–71, 873. “The study focused on the lawfulness of police action to halt a political demonstration for allegedly obstructing, threatening, or intimidating members of the public.” *Id.* at 862. If the associated position of protesters differed from the observers’ worldviews, identified through previously administered surveys, the observers were more likely to report that the police response was justified. *Id.* at 878–80.

457. *Id.* at 859. The CCP scholars explain that cultural cognition arises from the experience of “identity threat”:

researchers' findings show how these perceptions have the potential to be legally consequential, particularly in First Amendment cases in which the constitutionality of government action turns on an evaluation of whether the government acted to maintain necessary public order or merely invoked the responsibility for maintaining order to mask the suppression of disquieting but not disruptive dissent.<sup>458</sup> Discerning how the legal system could minimize the effects of cultural cognition's problematic distortions in judgment is a complex challenge.<sup>459</sup> However, one modest and defensible strategy in this specific student speech context, cases involving students' criticism of school operations, would be to evaluate school officials' disciplinary response by proceeding with an inquiry built out of the approach developed to resolve First Amendment retaliation claims, an approach similar to the Ninth Circuit's method in *Pinard*.<sup>460</sup> By undertaking a more demanding review of schools' reactions to student dissent, courts would exert a disciplining influence on educators, teaching both school officials and students that our claims of allegiance to First Amendment norms have credibility.<sup>461</sup>

The censoring or punishment of a student-critic should trigger more careful interrogation of school officials' motivation, an inquiry performed with less deference and more skepticism than the application of *Tinker's* disruption test has generally triggered. This inquiry could, of course, draw on statements by school personnel that demonstrate hostility to the student criticism, evidence like that presented in *Lowery* and *Walker-Serrano*. In addition, a reviewing court could test the credibility of purported operational justifications for the school's response by examining whether school officials can substantiate that it was the operational impact of the student's

---

An individual who comes to see behavior important to his cultural group as detrimental to society risks estrangement from those on whom he depends for material and emotional support. If the behavior is a source of status for the individual or for the group, then the prospect that others might form such a belief can diminish an individual's social standing generally. The mechanisms that cultural cognition comprises—from biased assimilation to selective attention and recall to skewed perceptions of expert credibility—all derive from the impulse to dismiss evidence that has these identity-threatening consequences.

*Id.* at 895.

458. *Id.* at 854.

459. *Id.* at 895–99 (describing potential corrective responses to cultural cognition).

460. See *supra* Part III.B.1 (discussing *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007)).

461. See Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421, 460–61 (1995) (describing salutary effects of judicial oversight of school officials' restrictive responses to student speech).

delivery of the critical message, not the message itself, which prompted the disciplinary reaction. The integrity of this variant on a secondary effects defense would be greatly enhanced by a showing that the school afforded the student-critic adequate alternative channels by which he or she could deliver the relevant complaints and concerns.

An appraisal of the adequacy of those channels would properly consider their visibility and accessibility, their incorporation of protective features, such as the availability of a bypass mechanism that would not require a student to present grievances to the school official whose conduct is at issue, and the extent to which these mechanisms provide transparency, allowing the public but, perhaps even more importantly, members of the school community, including other students, the opportunity to learn the substance of the student grievance and the basis for its resolution.<sup>462</sup> This kind of scrutiny would incentivize schools to re-examine their existing grievance procedures, assessing how such regimes, installed to comply with the obligations of federal civil rights laws, could be reworked to expand students' opportunities to register and resolve their complaints about school life. By expanding the opportunities for students to air and resolve grievances in school, educators might be able diffuse student frustration and hostility and offer needed guidance to students on how to communicate complaints in a persuasive, respectful, and responsible manner.<sup>463</sup> This kind of approach could potentially

---

462. This mode of analysis would import an incentive structure like that used to prevent and address workplace sexual harassment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (concluding that when a plaintiff alleges that a supervisor has created hostile work environment but taken no tangible employment action, the employer entity can assert an affirmative defense to vicarious liability by showing that the employer had taken reasonable care to prevent and promptly correct any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of the available complaint process and/or other preventive and corrective mechanisms); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same). Such a complaint procedure would have to be well-publicized, efficient, and effective to demonstrate requisite care. To comply with federal civil rights statutes, districts are already required to publicize and implement grievance procedures that provide for the prompt, equitable resolution of student and employee discrimination complaints. See 34 C.F.R. § 104.7(b) (2011); *id.* § 104.8 (2011); *id.* § 106.8(b) (2011); *id.* § 106.9 (2011); 28 C.F.R. § 35.106 (2010); *id.* § 35.107(b) (2010).

463. LEVINSON, NO CITIZEN, *supra* note 383, at 179 (criticizing vicious cycle in which schools, unwilling to trust students, deny them chances to make choices and take responsibility at school, leading some students to act irresponsibly and, in turn, precipitating greater restrictions on expression which ultimately exacerbate civic competency deficits).

reduce the mounting number of incidents involving extreme, vulgar, and intemperate on-line student speech about school personnel.<sup>464</sup>

A suitably demanding review should also address the nature of the sanction imposed, exploring whether a sanction's potential disproportionality conveys an intent to retaliate against a student critic and to deter future dissenters. Officials' recourse to the most severe sanctions, such as expulsion, long-term suspension, and permanent ineligibility from participation in school activities, could signal the presence of a problematic motive.<sup>465</sup> Perhaps most importantly, a reviewing court would examine how the school has engaged with the substance of a student's grievance. Although the use of intemperate or vulgar language to communicate a complaint can be properly reprimanded, that defect in presentation should not automatically nullify school officials' obligation to acknowledge a student's concerns and to offer a reasoned explanation of its resolution, including the steps taken to investigate the basis for the student's complaint.<sup>466</sup> Conversely, a student who, when disciplined,

---

464. See generally Katherine Hokenson, Comment, *My Teacher Sux! [Censored]: Protecting Students' Right to Free Speech on the Internet*, 28 J. MARSHALL J. COMPUTER & INFO. L. 385, 407–08 (2011) (examining proliferating controversies involving students' online criticism of school personnel). Cases examining such incidents include: *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc) (invalidating suspension of high school student for creating fake MySpace profile of principal); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1367, 1374 (S.D. Fla. 2010) (finding suspension of student for creating Facebook group entitled "Ms. Sarah Phelps is the worst teacher I've ever met" violated the First Amendment); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001) (invalidating suspension of high school student who had e-mailed classmates "Top Ten" list about school athletic director, deriding his appearance, including the size of his genitals); cf. *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 111 (2d Cir. 2012) (upholding suspension of ten-year-old fifth grader based on his crayon drawing of astronaut expressing wish to "[b]low up the school with the teachers in it"). For thoughtful explorations of First Amendment issues raised by student on-line speech, including speech directed at school officials, see Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008), recommending school initiatives to educate students about responsible use of digital media as more effective than punitive responses and more consistent with First Amendment principles, and Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591 (2011) [hereinafter Waldman, *Badmouthing Authority*], recommending that school officials have latitude to suppress dissent only under narrow interpretations what constitutes disruptive or offensive speech.

465. See Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303 (2012) (describing school officials' termination of students' eligibility to participate in school sports teams, student government, and other extra-curricular activities as punishment for speech deemed disruptive).

466. See *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 840–41 (N.D. Miss. 2012) (upholding students' suspension for Facebook posting of profanity-laden rap alleging coach's improper behavior toward female students without addressing the school's investigation of the substance of the students' accusations).

attempts to restyle personal harassment or credible threats to harm a teacher or administrator as a poorly crafted substantive critique should not expect a warm reception from a reviewing court.<sup>467</sup>

These analytical modifications would move toward a form of review reminiscent of intermediate scrutiny, a shift responsive to what Scott Moss has labeled the “excessive institutional tailoring” of First Amendment doctrine in cases involving schools, government workplaces, and prisons.<sup>468</sup> Moss has proposed that use of an intermediate scrutiny standard could counteract courts’ disturbing tendency to understate the risk of reflexively accepting relevant institutional decision-makers’ claimed expertise in assessing the operational costs and benefits of less restrictive expressive environments.<sup>469</sup> Moss asserts that the current doctrinal approach to the protection of the speech of public school students, government workers, and prisoners may actually exaggerate the uniqueness of such institutional environments.<sup>470</sup> Courts’ too-ready acceptance of claims that special institutional imperatives necessitate limiting expressive freedom could obscure the real possibility that government officials’ reactions could reflect the kind of deeply problematic motives that justify vigorous judicial interrogation of the basis for comparable restrictions outside such domains.<sup>471</sup> Like the Moss proposal, this Article’s recommended legal standard acknowledges that a school official is likely to be no less susceptible than other governmental actors to the temptation to react to speech on the basis of how it complicates the official’s administrative task or deviates from the official’s own preferred viewpoint, potentially skewing the calculus to favor the official’s own interest.<sup>472</sup>

However, this Article’s central ambition in constructing its recommended form of heightened scrutiny is the reinvigoration of

---

467. See Waldman, *Badmouthing Authority*, *supra* note 464, at 593 (examining the constitutional bases for differentiating schools’ authority to respond to speech that arguably threatens or primarily directs vulgarity at a school official and a more complex category of student expression: “speech that, while expressing non-threatening hostility toward a school official, also expresses a substantive viewpoint about that official’s behavior”).

468. Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635 (2007).

469. *Id.* at 1674–78.

470. *Id.* at 1671.

471. *Id.* at 1677, 1679.

472. Cf. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 876 (2008) (arguing that because schools and universities are “speech institutions that enhance the marketplace of ideas,” lawmakers and courts can properly give deference to judgments “choosing and applying rules designed to protect their institutional missions”).

educators' appreciation of the uniquely significant role schools play in cultivating students' speech-related citizenship capabilities and of schools' attendant obligation to guard against the devaluation of student dissent. By treating students' youth and susceptibility to influence as inevitable counterweights<sup>473</sup> that tip constitutional balancing against offering latitude to dissent about issues in or affecting the school, educators and courts fail to consider how the stifling of such expression could derail an essential pedagogical project for public education. Highlighting how this kind of miscalculation can lead to missed opportunities, Emily Buss notes children's need for both "controlled influence and opportunities for rights exercise":

Schools serve as one of the primary sites for positive influence, for the development of basic intellectual skills, the acquisition of knowledge, and the cultivation of prosocial behavior. To accomplish all this, schools need a level of control that may justify a diminution of rights. But schools are also one of the best testing grounds for the exercise of rights, offering students a society of peers with whom to interact and a governmental authority structure against which to push. Any analysis that takes only one of these two mechanisms of influence into account is developmentally incomplete.<sup>474</sup>

Thus, as Buss argues, giving children the opportunity to experiment with their rights may serve society's interest in children becoming effective "rights exercisers".<sup>475</sup> Providing such opportunities is particularly important because children and adolescents are "[d]evelopmentally primed"<sup>476</sup> to question and learn as they test their understandings and beliefs, including their understandings of and beliefs about the nature of citizenship and the authority. The experiences students have when they try to speak to school officials, embodiments of state power, will foreseeably shape their future habits and expectations as citizens of a constitutional democracy.<sup>477</sup>

---

473. See Buss, *supra* note 61, at 356 (criticizing the Supreme Court's interpretations of children's constitutional rights that "predictably cast the circumstances of childhood as a counterweight" to claims advancing a more capacious framing of children's entitlements).

474. *Id.* at 361–62.

475. *Id.* at 361.

476. *Id.* at 380.

477. *Id.*

## CONCLUSION

The equivocal reception students receive from courts when they invoke the First Amendment's protection against the suppression or punishment of acts of petition and protest reveals the devaluation of students' citizenship and of their potential to contribute to school improvement. From a practical perspective, such a deflated appraisal of students' capacities fails to apprehend the utility of student expression, as schools work to identify and eliminate sources of discord, dissatisfaction, and misunderstanding that compromise the academic environment. Moreover, too hastily forestalling students' opportunities to engage both their peers and school officials when facing perceived injustice or dysfunction licenses school officials' abdication or even repudiation of an implicit but essential instructional obligation—the cultivation of constitutional citizenship capabilities.

Lower courts' vigilance in protecting the participatory dimensions of citizenship at school has been inconsistent, a deficiency likely traceable to changing cues from the Supreme Court's student speech cases. Marked by a gradual shift from staunch validation of the value of discussion and dissent toward mounting apprehension about the costs of tolerating students' intemperate or clumsy experiments with expression, the Supreme Court's student speech precedents echo many educators' insistent assertion that a wider range of expressive latitude for students would be incompatible with an ordered and safe school environment. This view mistakenly communicates that citizenship requires only obedience, not critical engagement.

The image of the student as a passive recipient of constitutional inculcation rather than as an agent of constitutional enforcement and institutional reform may be more palatable to school officials, but it is not an adequate rendition of constitutional citizenship. Schools should acknowledge that opportunities for students to air grievances and receive respectful responses would fulfill rather than impede schools' instructional duties. By failing to apply sufficiently rigorous scrutiny to school officials' justifications for the silencing of student dissent, courts become complicit in schools' dereliction of their duty to help students acquire the capabilities of citizenship.